92-923

No. 92-_____

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STEPHEN M. GALLAGHER and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,
Petitioners,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY; and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state electoral system which disfranchises thousands of properly registered voters who move within the state after the close of pre-election of registration a sufficiently severe restriction on voter eligibility to require justification by a compelling state interest?

2. Do those provisions of the Indiana Election Code which disqualify properly registered voters who move their residence across a county line within the state, within thirty days before an election, from voting for all offices and ballot propositions except President and Vice President, and which permit properly registered voters who move within a county during the same time period, or who have moved outside the United States at any time, to vote for all federal, state and local

offices, violate the Equal Protection Clause of the Fourteenth Amendment?

3. Do those provisions of the Indiana Election Code which require a properly registered voter who changes residence to a different electoral precinct within a county, within thirty days before an election, to obtain a special affidavit from the county voter registration office before the day of election as a condition to eligibility to vote for all offices or ballot propositions at that election, but permit the same voter to vote only for President and Vice President of the United States by signing a similar affidavit on election day at the voting precinct where the voter is registered, unreasonably burden the voter's fundamental right to vote without sufficient justification, in violation of the Equal Protection Clause of the Fourteenth Amendment?

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OPINIONS OF COURTS

The opinion of the Supreme Court of Indiana in this case, App. 1-30, is reported at 598 N.E.2d 510 (1992). The opinion of the Court of Appeals of Indiana, Second District, App. 63-82, is reported at 579 N.E.2d 649 (1991). The findings of fact, conclusions of law and decision of the Marion Superior Court Room 1, App. 31-62, is not reported.

GROUNDS FOR JURISDICTION OF THIS COURT

The decision and judgment of the Supreme Court of Indiana sought to be reviewed was entered August 28, 1992. No petition for rehearing was filed. This Court has jurisdiction to review the final judgment of the Supreme Court of Indiana, which decides the validity of statutes of Indiana challenged as repugnant to the United States

Constitution, pursuant to 28 U.S. Code §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as it applies to certain provisions of the Indiana Constitution and Indiana Election Code. The principal state constitutional and statutory provisions involved are Article 2, Section 2 of the Indiana Constitution, and Indiana Code §§3-7-4, 3-7-8-2 and 3-11-8-2.

In addition, certain other provisions of the Indiana Constitution and Indiana Election Code are necessary to an understanding of the context in which the issues in this case arise, in light of the relevant parts of Indiana

election procedures. Those provisions are Article 2, §14 of the Indiana Constitution, and the following provisions of the Indiana Election Code: Ind. Code §§3-5-2-40, 3-6-5-14, 3-7-3-1, 3-7-3-2, 3-7-3-5, 3-7-3-6, 3-7-7-9, 3-7-8-1, 3-7-8-15, 3-11-1.5-3, 3-11-1.5-4, 3-11-1.5-5, 3-11-3-17, 3-11-4-8, 3-11-4-9.

The full text of each of the foregoing statutes and constitutional provisions is contained in a separate appendix, pursuant to Rule 14.1(f). The text of each referenced Election Code section appears in numerical order at App. 83-106.

STATEMENT OF THE CASE

1. Indiana Election Laws Applicable to Voters.

The basic eligibility requirements for voters in Indiana are stated in

Article 2, Section 2 of the Indiana Constitution:

> "Every citizen of the United States, of the age of 18 years or more, who has been a resident of a precinct 30 days immediately preceding such election, shall be entitled to vote in that precinct."

In Indiana a "precinct" is a geographical area established solely for the purpose of conducting elections, defined in the Indiana Election Code as "a subdivision of a county or township established for election purposes." Ind. Code 3-5-2-40. The boundaries of a precinct are established by the county executive based on census blocks and, with minor exceptions, must be drawn to contain no more than 800 voters, without crossing the boundary of any governmental unit or legislative district. Ind. Code 3-11-1.5, sections 3, 4 and 5.

The Indiana Constitution authorizes the General Assembly to provide by law for the registration of qualified voters. Article 2, Section 14. The Indiana Election Code establishes registration periods for new registrations or transfers within a county, ending on the 29th day before the date of any primary, general or municipal election. Ind. Code 3-7-3-5. Registration records are organized by precinct, Ind. Code 3-7-3-1, and once registered in a precinct the voter is not required to register again for subsequent elections so long as the voter resides at the same address. Ind. Code 3-7-3-2. However, upon changing residence the voter must transfer the voter's registration to the new address during the period of registration. Ind. Code 3-7-8-1; 3-7-8-2. The County Board of Voter Registration or Clerk must

prepare a list of registered voters for each precinct in the county no later than ten days before an election, Ind. Code 3-7-7-9, and the County Election Board, which is responsible for the actual conduct of any election in Indiana, Ind. Code 3-6-5-14, prepares poll lists with the names and addresses of all registered voters by precinct, for use in the election. Ind. Code 3-11-3-17.

To be entitled to vote in any election, a voter must be properly registered in the precinct in which the voter resides. Ind. Code 3-7-3-6. Regardless of the precinct of registration, the voter may vote only in the precinct where the voter resides on the day of election, with certain specified exceptions. Ind. Code 3-11-8-2. Two of those exceptions are at issue in this case.

One exception, Ind. Code 3-7-4, applies only to voting at a general election for electors for President and Vice President of the United States. If the voter moved from an Indiana precinct in which the voter was properly registered, within 30 days before the election, and cannot meet the residency requirements of the voter's new home, the voter may vote at the former precinct in person or by absentee ballot, by signing a special affidavit showing the qualifying change of residence, either before election day at the office of the County Clerk or Board of Registration, or at the precinct of former residence on election day.

The second exception applies to voters who move to a different precinct within the same county within 30 days before an election, and permits those voters to vote at the precinct of former

residence, where the voter is properly registered, for all offices or propositions to be voted on at the election. A voter desiring to vote under this exception must sign a special affidavit requesting transfer of registration after the election, at the office of the Clerk or Board of Registration, no later than 4:00 p.m. on the Monday before election day, and furnish a copy of the affidavit to the proper precinct election board (or attach it to the voter's absentee ballot, if eligible to vote absentee). Ind. Code 3-7-8-2(c)-(e). This procedure is not available to a voter

who moved to a different county in Indiana.[1/]

A third exception, not directly referenced in Ind. Code 3-11-8-2, applies to voters permanently residing outside the United States who were qualified voters in an Indiana precinct before leaving the United States. Those voters are eligible to vote by absentee ballot for all offices and propositions on the ballot in the precinct where the

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1/ Notwithstanding the general requirement that a voter changing address must transfer registration to the new address, Ind. Code 3-7-8-1, if the voter's new address is within the same precinct, the voter may vote at that precinct without obtaining a pre-election transfer affidavit from the registration board, by writing the voter's correct address on the poll list at the precinct on election day. Ind. Code 3-7-8-15.

voter resided before moving overseas. Ind. Code 3-11-4-8, 3-11-4-9.[2/]

2. Plaintiffs and Their Classes.

Plaintiff Gallagher changed his residence from Marion County, where he was a properly registered voter, to adjacent Hendricks County in Indiana less than 30 days before the November, 1988 general election. Local election officials advised him that he was ineligible to vote in that election, except for presidential electors. Gallagher's complaint challenged his disfranchisement under both the state constitution and the equal protection clause of the Fourteenth Amendment. His motion for preliminary injunction was

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[2/] Federal law requires that states provide a procedure whereby overseas residents can vote for federal offices, but does not apply to state or local elections. 42 U.S. Code §§1973ff through 1973ff-6.

denied on November 4, 1988. After the election, Gallagher filed an amended complaint, on behalf of a class of voters similarly situated, requesting injunctive and declaratory relief, plus damages for denial of his right to vote for federal offices.

Plaintiff Mouser moved to a different precinct within Marion County within 30 days before the November, 1988 general election. After unsuccessfully attempting to contact election officials by telephone to inquire about procedures for voting, Mouser visited the Board of Registration office in person on the day before the election, and was told that it was too late for him to preserve his general voting eligibility at his

precinct of former residence.[3/] He completed an affidavit of change of residence for presidential voting only, and voted at his former precinct for President and Vice President but no other offices.

After the election Mouser moved to intervene as a plaintiff in this action, and submitted an intervening complaint challenging the application to him, and other similarly situated voters, of the intracounty transfer provisions of Ind. Code 3-7-8-2, under both the State Constitution and the Fourteenth Amendment equal protection clause. His motion to intervene was granted on February 21, 1989.

[3/] In 1988 Ind. Code 3-7-8-2(c) required that the request for transfer affidavit be submitted to the Board of Registration no later than the Friday before election. In 1991 the statute was amended to its present form.

The trial court certified the case as a class action under Indiana Trial Rule 23, and defined subclasses A and B as follows:

> "Subclass A [the Gallagher class] consists of all persons who are residents and registered voters in Indiana and who changed their residence within 30 days prior to an election from a precinct in one county to a precinct in a different county within Indiana.
>
> Subclass B [the Mouser class] consists of all persons who are residents and registered voters in Indiana and who changed their residence within 30 days prior to an election from one precinct to another precinct within the same county in Indiana, and who fail or are unable to comply with the requirements of IC 3-7-8-2 as a condition to eligibility to vote in the precinct from which they moved."

Undisputed evidence at trial, based on official census reports and expert testimony, established that approximately 35,000 Indiana registered voters would move from their precinct of residence within 30 days before any

election, and therefore would potentially be within the scope of subclasses A and P as defined by the court. More than 25,000 registered voters would be likely to have moved within their county of residence, and approximately 8,900 registered voters would be likely to have moved from one county to another in Indiana, within 30 days preceding an election. Moreover, population trends evidence increasing mobility. Nevertheless, in 1988 only 4.3 percent of the estimated number of affected registered voters in Marion County preserved their voting rights in that election by complying with the procedures required under Ind. Code 3-7-8-2.

3. Decisions of the State Courts.

The Marion Superior Court entered its Findings of Fact, Conclusions of Law and Judgment on April 6, 1990. The

court, after reviewing the history of Article 2, Section 2 of the State Constitution and concluding that it requires a qualified voter to be a resident of the precinct in which the voter offers to vote for a continuous period of thirty days immediately preceding an election, concluded that this precinct residency requirement does not violate the United States Constitution, relying on Dunn v. Plumstein, 405 U.S. 330 (1972). App. 59-60. The trial court did not address the equal protection issues argued by plaintiffs based on the differing voter eligibility rules among voters moving within a county, voters moving between counties in Indiana, and voters who have moved overseas.

The Indiana Court of Appeals affirmed the trial court's interpretation of the State

Constitution, and then addressed the equal protection issues argued by plaintiffs. Turning first to the proper standard of review under the equal protection clause, the Court of Appeals held the standard to be applied in this case was "strict scrutiny" because "the right to vote has long been accorded the status of a fundamental right," citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972). App. 77. The court concluded that the state had failed to offer a compelling state interest for the distinction between the voting rights of the Callagher and Mouser subclasses, and therefore the distinction could not survive "strict equal protection scrutiny." App. 78. The court went on to hold that even if "low-level equal protection scrutiny," under which the statute "needs only to be rationally related to a legitimate state interest,"

were the applicable standard, the statutory scheme failed the equal protection test. Because transfer requests could be acted on only after an election, the proffered justification of "administrative convenience" "bears no rational relationship to the distinction in voting rights between voters who move intra-county and make a timely transfer request and either of the subclasses Gallagher and Mouser represent. Further, we cannot conceive any legitimate state interest that would justify such a distinction." App. 80. Concluding that the statutory scheme limiting the rights of moving voters to voting only for President and Vice President is unconstitutional under the equal protection clause, the Court of Appeals reversed and remanded the judgment of the trial court. App. 81.

The Indiana Supreme Court granted transfer and affirmed the trial court. Agreeing with the lower courts' interpretation of the state constitutional provisions on voter qualifications, App. 10-18, the Supreme Court concluded that the use of the strict scrutiny equal protection test "in this context was error" because the plaintiffs "do not . . . enjoy a fundamental right to vote in a precinct in which they do not reside." App. 20-21. The court therefore analyzed the issues under the traditional "rational basis" equal protection test applied by this Court in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

Regarding the Gallagher class of intra-county movers, the Supreme Court found a rational basis for the difference in voting eligibility between intercounty and intracounty movers,

concluding that the legislature "could have reasonably assumed" that a move within the same county was "less likely to result in a voter changing congressional or legislative districts and would be less likely to diminish the voter's legitimate interest in the local election", App. 23, notwithstanding the fact that members of the Gallagher class have not moved from the state and are disqualified from voting for statewide, federal and state offices as well as any state issues which may be on the ballot. The court's approval of this result is premised on the conclusion that the Gallagher class members retained no fundamental right to vote in state elections because they "cannot meet the 30-day [precinct] durational residency requirement." App. 25.

Reasoning that disqualification of the Mouser class was caused by "failure

to take timely steps to fulfill [the statute's] minimal requirements" to obtain a transfer affidavit from the voter registration office before election day, the court concluded that the statutory requirement "easily passes the rational basis test." App. 29. The court did not mention the fact that the Election Code permits moving voters to complete transfer affidavits at the polling places of their former precincts on election day and to vote in that election for President and Vice President (as Mouser did in 1988), or the fact that those transfer affidavits are delivered to the central county election offices where they can be processed after the election (as the Court of Appeals had noted). The Supreme Court justified the unique Indiana procedure on the grounds that "common sense dictates that

administrative convenience is served by a system requiring transfer affidavits to be executed in the office where the voting registration records are kept" and that "the statutory scheme at issue might help ensure that voters who move after the registration deadline actually inform the election office so a transfer of registration can be effected." App. 29-30.

The court therefore concluded that the statutes involved in this case, which effectively disfranchise all inter-county movers and most intra-county movers, consisting of a significant number of otherwise qualified Indiana voters, "do not violate equal protection guarantees." App. 30.

4. Federal Constitutional Issues Presented in State Courts.

In his second amended complaint filed December 1, 1988, Gallagher brought suit under 42 U.S.C. §1983 against the state and county election officials, alleging the rights of the members of his class to equal protection of the law under the Fourteenth Amendment were violated by the provisions of the Indiana Election Code which permit intracounty movers to vote in their precinct of former residence for federal and statewide candidates and statewide ballot propositions, but deny the same right to intercounty movers (Count III, App. 108-109). Gallagher requested declaratory and injunctive relief as to the statutory provisions which disfranchise the members of his class. App. 110-111.

In his amended intervening complaint submitted February 7, 1989, Mouser also sued under 42 U.S.C. §1983 and alleged that the provisions of the Election Code which require him and the members of his class to have executed a transfer affidavit at least four days before the date of the election at the office of the county clerk or board of registration, and deny voting rights to those intracounty movers who were unable to satisfy that requirement, violated the rights of the class members to equal protection guaranteed by the Fourteenth Amendment (Count III, App. 114-115). Mouser also requested declaratory and injunctive relief with respect to the requirements of Ind. Code 3-7-8-2, requesting that they be allowed to vote in all elections upon compliance with the procedure specified under IC 3-7-4

relating to presidential elections. App. 116-118.

When the trial court did not address these issues upon concluding that the voting rights of both subclasses could properly be denied under the ruling in Dunn v. Blumstein, both the Gallagher and Mouser subclasses argued on appeal that those provisions of the Indiana Election Code which effectively prevented them from voting, except for presidential electors, violated their constitutionally guaranteed right to equal protection of the laws (Brief Part II, argument headings at App. 119-120). The Court of Appeals addressed those issues, holding the statutes in question violative of the equal protection clause. On petition to transfer to the Indiana Supreme Court, the state election officials argued that the Court of Appeals erroneously decided the

issues under the equal protection clause (Part I of Brief, argument headings at App. 121), and the Supreme Court passed on those issues with respect to both the Gallagher and Mouser subclasses in affirming the trial court.

REASONS FOR GRANTING THE WRIT

1. The Indiana Supreme Court's Application of the Rational Basis Standard of Review to Disfranchisement of Properly Registered Voters of the Relevant Political Unit Conflicts with Controlling Precedents of This Court.

In its most recent voting rights decision, this Court stated:

> "The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in [Anderson v. Celebrezze, 460 U.S. 780 (1983)]."
>
> Burdick v. Takushi, 504 U.S. ____, ____, 119 L.Ed.2d 245, 256 (1992).

Weighing Hawaii's ban on write-in voting against the ease of compliance with the

State's ballot access alternatives, this Court upheld the restriction as imposing "only a limited burden on voters' rights to make free choices and to associate politically through the vote", Id., and concluded that the "legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters." Id. at 257-258.

Earlier in the same term this Court also applied the Anderson balancing standard to strike down an Illinois law requiring a county candidate of a new political party to obtain 25,000 signatures in each electoral district, as compared to the same total signature requirement for a candidate in a statewide election, stating:

> "To the degree that a State would thwart [the interest of likeminded voters to gather in pursuit of common political ends] by limiting the access of new parties to the ballot, we

> have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, see Anderson, supra, at 789, and we have accordingly required any severe restriction to be narrowly drawn to advance a State interest of compelling importance."

Norman v. Reed, 502 U.S. _____, _____ 116 L.Ed.2d 711, 723 (1992).

In Anderson v. Celebrezze, speaking to the "analytical process" a court must use in evaluating constitutional challenges to specific provisions of a state's election laws, this Court articulated the following standard:

> "It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to

> burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."
>
> Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

In Anderson the result of this analysis was invalidation of a March filing deadline for ballot access applied to an independent candidate for President. The same standard was used in Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214 (1986), to strike down a state law preventing a political party from permitting independent voters to participate in certain party primaries.

In deciding this case the Indiana Supreme Court did not follow the analysis employed in Anderson, Tashjian, Norman and Burdick. Instead, it relied on Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978) and

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 732 (1973), for the proposition that "the appropriate inquiry is whether 'any stated facts reasonably may be conceived to justify' the distinction in voting rights at issue in this case." App. 21.

The Indiana Court of Appeals, which did not have the opportunity to consider this Court's decisions in Norman and Burdick, expressly rejected the State's argument that this Court's decision in Holt Civic Club "requires application of low-level equal protection scrutiny in this case" and held that "the proper standard is strict scrutiny" based on Dunn v. Blumstein, 405 U.S. 330 (1972), App. 76-77. Application of that standard resulted in the court's holding that the statutes disfranchising late moving voters "are unconstitutional

under the Equal Protection Clause." App. 81.[4/]

The so-called strict scrutiny equal protection test applied in Dunn to state durational residency requirements for voter eligibility was first fully articulated in Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-628 (1969), which invalidated the limitation of a school district electorate to residents of the district who owned or leased real property there or had children enrolled in the schools. Previous voter eligibility cases which in effect applied the same strict standard, without discussion of its

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[4/] Alternatively, the Court of Appeals concluded that the challenged provisions failed "even if low-level equal protection analysis was appropriate in this case." App. 78.

variance from the more traditional equal protection test, include Carrington v. Rash, 380 U.S. 89 (1965) (ineligibility of military personnel to qualify as resident voters) and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax payment requirement for voting eligibility in state elections).

After Kramer strict scrutiny was also applied to invalidate voter eligibility restrictions in Cipriano v. City of Houma, 395 U.S. 701 (1969) (revenue bond elections restricted to property taxpayers), Evans v. Cornman, 398 U.S. 419 (1970) (residents of federal enclaves in state could not vote in state elections), City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bond elections limited to real property taxpayers) and Hill v. Stone, 421 U.S. 289 (1975) (property required to be listed for

taxation as condition to voting eligibility in city bond elections). The same test was applied to invalidate certain ballot access restrictions, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (substantial filing fee requirements for primary), Moore v. Ogilvie, 394 U.S. 814 (1969) (formula for distribution of petition signatures among counties regardless of size), Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (signature requirement for independent candidate or new party more burdensome for city mayoral election than for statewide election). Heightened scrutiny was also applied in American Party of Texas v. White, 415 U.S. 767 (1974) (upholding ballot qualification requirements for new parties and independent candidates, in relation to percentage of votes received

in last election, and exclusion of minor parties from public financing of primaries).

In addition to Holt Civic Club and Salyer, decisions which expressly employed the deferential rational basis test include McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969) (unavailability of absentee ballots to pretrial detainees absent proof that other methods of voting were not provided), Rosario v. Rockefeller, 410 U.S. 752 (1973) (pre-primary cutoff deadline for enrollment in party) and Ball v. James, 451 U.S. 355 (1981) (limitation to land owners of right to vote for directors of water reclamation district). In each of those cases the Court sustained the challenged restrictions.

A few cases prior to Anderson invalidated state election law

restrictions without discussing the applicable standard of review, e.g., Lubin v. Panish, 415 U.S. 709 (1974) (requirement that indigent candidate pay filing fees for ballot access).

This Court has never decided a case challenging denial of voting rights to bona fide residents of an electoral unit, solely because of a change of residence within the unit after the registration cutoff date. The relevant facts appear more analogous to Kramer and Evans than to Holt, thereby pointing toward strict scrutiny as the applicable equal protection test. For Holt to control one must accept the proposition that an Indiana precinct is the relevant unit of government for determining the voter's eligibility based on residence. However, Indiana law makes clear that precincts are neither governmental units nor electoral districts, since they

elect no public officials and have no governmental functions; they are simply administrative units established for the convenience of administering elections.

Clearly this case is not simply an application of the rule permitting reasonable pre-election registration cutoffs approved in Dunn and its progeny, Marston v. Lewis, 410 U.S. 679 (1973) and Burns v. Fortson, 410 U.S. 686 (1973). Both the Gallagher and Mouser classes, by definition, have met Indiana's residency and registration requirements for the electoral districts in which they seek to vote. They do not challenge Indiana's 30-day durational residency requirement for purposes of eligibility to register at a new address under Ind. Code 3-7-3-5, but only the State's prohibition on their moving within the state after the registration cutoff date on penalty of losing their

right to vote for members of Congress and for state and local officials, at the polling places where their names properly appear on the voter rolls.[5/]

This Court should grant certiorari to resolve the conflict between the courts below concerning the proper standard of review to be utilized in evaluating plaintiff's equal protection challenges to the Indiana statutes disfranchising or placing onerous burdens on voters who change residence to a different precinct within the state after close of registration and who seek to vote at their precincts of registration, and to determine whether

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[5/] The plaintiff in Dunn did not meet the in-state durational residency requirement. Tennessee law provides, as it did at the time of the Dunn decision, that a voter moving within the state less than 90 days before an election may vote in the precinct where registered. Tenn. Code Ann. §2-7-115(a); Dunn, 405 U.S. at 333 n. 2.

failure of the state to preserve the voting eligibility of these classes of voters severely burdens, without a sufficiently justifiable state interest, the right of these classes of voters to vote.

2. The Eligibility Requirements for Intra-County Movers Fails the Most Deferential Rational Basis Test Utilized by This Court in Voting Rights Cases.

Even if, as the Indiana Supreme Court concluded, the pre-election affidavit requirement applied to the Mouser subclass as a condition to voting eligibility does not theoretically deprive those voters of their vote (although 96% of those potentially eligible were in practice disfranchised by this condition in 1988), the State's restriction must still satisfy the deferential rational relationship standard to satisfy an equal protection challenge.

The court's speculation that this requirement serves the administrative convenience of the voter registration officials is conclusively contradicted by the record. The state presented no evidence suggesting this requirement assists the administration of elections. Indeed, Marion County election officials testified that the requirement actually disserves their convenience in light of their other pre-election duties. And since intra-county movers who fail to obtain the pre-election affidavit from the Registration Board may complete a similar affidavit at the precinct for the presidential election, and those affidavits are turned in to the central election office after election for appropriate registration changes, the lower court failed to give any rationale for the greater requirement imposed on

voters desiring to vote for offices other than President.

Where no rational basis for a given classification appears, this Court has not hesitated to invalidate it as a violation of the equal protection clause of the Fourteenth Amendment. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (no record support for special permit requirement for group home for the mentally retarded as compared to other similar uses). In election cases this Court also has stricken irrational requirements which effectively disfranchise voters without applying heightened scrutiny, where no reasonable explanation was apparent. One example is O'Brien v. Skinner, 414 U.S. 524 (1974), where the Court invalidated New York's failure to provide absentee registration and voting procedures for eligible pretrial

detainees confined in the county of their legal residence, while permitting those procedures for any eligible voters, including pretrial detainees, unavoidably absent from their county of residence.[6/] In Illinois State Board of Elections v. Socialist Workers Party, Justice Rehnquist, who did not subscribe to the Court's use of strict scrutiny in this type of case, concluded that the statutory disparate treatment of signature requirements for statewide and Chicago candidates "bears no rational relationship to any state interest." 440 U.S. at 191. Likewise, in Cipriano two Justices concurred in striking the revenue bond voting eligibility limitations under the rational basis

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[6/] Although three Justices would have applied the compelling state interest test to this classification, the majority found it unnecessary to do so.

standard as involving "a voting classification wholly irrelevant to achievement of the State's objective", 395 U.S. at 707.

The fact that Indiana's requirement of completion of a pre-election affidavit obtained from a central office is unique among the 50 states argues persuasively that the state is unable to show any rational basis for the requirement.[7/] This Court has on more than one occasion noted the absence of the challenged restriction in most

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[7/] A survey of state laws relating to transient voters showed that all but six of the 47 states having a pre-election durational residence requirement greater than three days provide for retention of voting eligibility at the voter's former residence, and one state allows the voter to vote at the new location (32 states include inter-county movers). None, except Indiana, requires a pre-election special affidavit. Appendix to Appellants' Brief in Indiana Court of Appeals.

states as demonstrating a lack of sufficient justification for the requirement, e.g., Harman v. Forssenius, 380 U.S. 528, 543 (1965) (pre-election certificate of residence filed with city or county treasurer), City of Phoenix v. Kolodziejski, 399 U.S. 204, 212-213 (1970) (only 14 states restricted to property owners franchise on general obligation bonds).

This Court should grant certiorari to review whether Indiana's unique requirement of a pre-election transfer affidavit for intra-county movers, which is not used until after the election, lacks a sufficient rational basis to pass muster under the equal protection clause as a procedure which effectively disfranchises most voters to which it applies.

3. The Indiana Supreme Court's Decision That Disfranchisement of Late Moving Voters Does Not Violate the Equal Protection Clause Conflicts Directly with a Decision on the Same Issue by the New Jersey Appellate Court.

Neither the Indiana Supreme Court nor the Indiana Court of Appeals cited or discussed Afran v. County of Somerset, 244 N.J.Super. 229, 581 A.2d 1359 (1990), although the case was cited to both courts and discussed extensively in plaintiffs' briefs. The Afran court held that a construction of state law denying the franchise to a registered voter who moved to another county within the state, within the 30 day period before election when the registration books were closed, would place the state law "on a collision course with the United States Constitution" as interpreted by this Court in Dunn. 581 A.2d at 1363. Noting the distinction between a uniformly applied bona fide

residence requirement and a durational residence requirement, the Afran court concluded:

> "We have no doubt that the 30-day durational requirement for bona fide state residents readily meets the requisite stringent standard ... We do not, however, perceive any similar compelling State interest justifying an additional, new, and independent 30-day county resident requirement for a state resident who simply moves to a different county from the one in which he is already residing, in which he has permanently registered, and in whose election books he already has his page ... Nor have defendants been able to suggest to us any compelling state interest justifying the disparity between an intra-county mover and an inter-county mover either in terms of the mechanics of conducting the election or in generally protecting the integrity of the election process." Id.

Since the court in Afran found the election mechanism could not feasibly be adapted to limit the right to vote of both intra-county and inter-county

movers to candidates and questions common to their old and new election districts, the court concluded that both categories of voters had to be permitted to vote in the ensuing election at their precinct of registration, as state law already permitted in the case of intra-county movers.

This same issue had been presented to the Ninth Circuit in Barilla v. Ervin, 886 F.2d 1514 (9th Cir. 1989), but the issue was mooted as to future elections when Oregon enacted a law allowing all persons moving within 40 days prior to an election to vote without having to reregister. 886 F.2d at 1519, 1521. No other reported decision in either state or federal courts has been found which addresses this precise issue.

4. Denial of Voting Rights to the Many Thousands of Voters in Indiana and Other States Which Have No Adequate Provision to Preserve Voting Fligibility for Registered Voters Who Move Within the State After the Pre-election Cutoff Date Is an Important and Substantial Issue Arising Under the Equal Protection Clause on Which This Court Should Provide Guidance.

The undisputed evidence in this case, based on official census reports and expert testimony, established that approximately 35,900 Indiana registered voters move from their precinct of residence within 30 days before any election, and therefore would potentially be within the scope of Subclasses A and B. More than 25,000 registered voters would be likely to have moved within their county of residence, and approximately 8,900 registered voters would be likely to have moved from one county to another in Indiana, within 30 days preceding an

election. Moreover, population trends evidence increasing mobility.

It appears that between six and twelve states disfranchise registered voters who move within the state shortly before an election. See Record, Brief and Appendix of Appellants in Indiana Court of Appeals, Appendix A, and Record 589-591 (expert witness Henderson testimony regarding voting registration and election procedures in the laws of other states). While there is no record evidence concerning how many registered voters are disfranchised by these laws in other states, the number must reach in the hundreds of thousands given the 35,000 figure for Indiana. The effect of these laws is thus substantial, and justifies this Court's intervention and protection of the right to vote of this large group of disfranchised voters.

DATED: November 24, 1992.

Respectfully submitted,

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No. 92-_____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STEVEN M. GALLAGHER and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,
Petitioners,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY; and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[Filed August 28, 1992]

IN THE

SUPREME COURT OF INDIANA

STEPHEN M. GALLAGHER, and KEVIN MOUSER, individually and representatives of all other individuals similarly situated, Appellants (Plaintiffs Below),	)	
v.	)	No. 49S02-9208-CV-646 in the Supreme Court
INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY, and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD, MARION COUNTY ELECTION BOARD, and MARION COUNTY BOARD OF VOTER REGISTRATION, Appellees (Defendants Below).	)	No. 49A02-9007-CV-431 in the Court of Appeals

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APPEAL FROM THE MARION SUPERIOR COURT,
Civil Division, Room 1
The Honorable Anthony M. Metz III, Judge
Cause No. 49D01-8810-CP-1489
On Petition to Transfer

SHEPARD, Chief Justice.

Appellants Stephen Gallagher and Kevin Mouser were registered in plenty of time to vote in the 1988 general election in Marion County, but they moved out of their precincts in the month before election day. Gallagher moved to Hendricks County, Mouser moved to another precinct within Marion County. As a result of these moves, Indiana's voting laws restricted their ability to vote. Both sought full franchise by filing a class action suit on behalf of themselves and others similarly situated. The trial court upheld the voting statutes. The Court of Appeals

reversed, Gallagher v. Election Bd. (1991), Ind. App., 579 N.E.2d 649, holding that the statute which limits voting rights of those who move after the registration deadline violates the equal protection clause of the fourteenth amendment.

The Indiana State Election Board, Marion County Election Board, and Marion County Board of Voter Registration, appellees (collectively referred to as the "Election Board"), have petitioned for transfer. Because this case involves questions of substantial importance, namely the constitutionality of our state's voting laws, we today grant appellees' petition.

We observe that good public policy would extend the opportunity to register and vote to as many Americans as possible,

and we have examined this case with that idea in mind. Still, the method of expanding the franchise is a matter placed in the hands of the people of Indiana speaking through their constitution and through their elected representatives. The role of this Court is a relatively specific one, namely, deciding the two constitutional questions which arise in this litigation:

1. Whether Article II, § 2 of the Indiana Constitution creates a "day of record" for purposes of voting, whereby the precinct in which a voter maintains residency on the thirtieth day before an election is that voter's voting precinct, even if the voter moves from that precinct before the election, and

2. Whether the statutes which govern voting by registered voters who move to a new precinct within thirty days of an election violate the equal protection clause of the United States Constitution.

I. The Statutory Framework

Article II, § 2 of the Indiana Constitution defines who may vote in Indiana: "Every citizen of the United States, of the age of eighteen (18) years or more, who has been a resident of a precinct thirty (30) days immediately preceding such election, shall be entitled to vote in that precinct." Because it is essential to safeguard the ballot box and protect the integrity of elections, Article II, § 14 further directs the General Assembly to

"provide for the registration of all persons entitled to vote." Thus, our constitution "not only confers upon the General Assembly the power to make illegal voting an impossibility by a proper system of registration, but it makes it the imperative duty of that body to exercise that power." Morris v. Powell (1890), 125 Ind. 281, 296, 25 N.E. 221, 226.[1/]

1/ See also Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1084 (2nd ed. 1988) ("Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity. If nothing else, even though anyone in the world might have some interest in any given election's outcome, a community should be empowered to exclude from its elections persons with no real nexus to the community as such.")

The General Assembly has fulfilled its duty by enacting a series of voter registration laws found in Title 3 of the Indiana Code. Those laws treat voters who change counties differently than voters who move within a county. Essentially, those who move to another county within thirty days of election day cannot vote in an Indiana election; those who move to another precinct within the same county can. It is this disparate treatment that, in part, has caused this lawsuit.

Before explaining these provisions in further detail, we first note that any time a voter moves to a new precinct, he must have his registration transferred to that new precinct no later than the twenty-ninth day prior to election day to enable him to vote in the new

precinct. Ind. Code Ann. § 3-7-3-5 (West Supp. 1992). Consequently, a resident of a precinct who is otherwise qualified cannot vote in the new precinct if he became a precinct resident within thirty days of an election.

He can, however, vote in his former precinct if his new precinct is in the same county and he has completed an affidavit at the county election office requesting a transfer of registration. He cannot return to his former precinct, however, and vote in an Indiana election

if he has moved to another county during the last 30 days.[2/]

Gallagher and Mouser each moved within thirty days of Election Day 1988, after the voter registration deadline had passed. Both were allowed to vote for President and Vice President in their former precincts as required by federal law, but that is all. Gallagher's state

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2/ Those who move from one county to another in the month before election are not completely disenfranchised. They can return to their former precincts and vote in the presidential election. The right to vote for President and Vice President notwithstanding certain state registration laws is mandated by 42 U.S.C. § 1973aa-1(e) (1988), a provision of the Voting Rights Act of 1970. Thus, while voters like Gallagher and Mouser can be denied their state franchise for failure to comply with durational residency requirements, they must be allowed to vote for President and Vice President, so long as they were properly registered in their old precincts before moving within thirty days of the election. See, also, Ind. Code Ann. § 3-7-4-1 to -6 (West 1988).

and local franchise was denied because he had moved to another county, Mouser's because he had not completed an affidavit at the Marion County election office as required.[3/]

II. Indiana Constitutional Question

Gallagher and Mouser first challenge the trial court's conclusion that Article II, § 2 of the Indiana Constitution does not establish a "record date" for purposes of determining voter eligibility. They interpret this

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[3/] Ind. Code § 3-7-8-2 was amended in 1991. The deadline for completing the transfer affidavit is now 4 p.m., Monday, the day before the election. Prior to that time, the deadline for intra-county movers to request a registration transfer was the last Friday before the election. This is the deadline Mouser missed when he waited until Monday to go to the election office. See Ind. Code Ann. § 3-7-8-2(b) (West 1988).

provision to say that a voter's residence on the thirtieth day prior to an election is his residence for voting purposes, even if he moves to another precinct during the thirty-day interim between the registration deadline and election day. The Court of Appeals rejected this interpretation and held that Article II, § 2 unequivocally requires precinct residency for thirty continuous days prior to an election. Writing for the court, Judge Shields noted:

> The key language at issue is: "Every citizen . . . who has been a resident of a precinct thirty (30) days immediately preceding such election. . ." Ind. Const. art 2, § 2. The phrase "has been a resident . . . thirty (30) days" indicates the criterion involves a period of time rather than a specific point in time. Thus the language of Ind. Const. art. 2, § 2 is unambiguous and clearly does not provide a "day of record" for purposes of voting and to that extent we agree with the trial court.

Gallagher, 579 N.E.2d at 652.

We think Judge Shields is correct about the plain meaning of the section in question. Moreover, the known history of this provision leads to the same conclusion.

"In placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy." State v. Gibson (1871), 36 Ind. 389, 391. The history of section 2 is accurately chronicled in Judge Metz' Conclusions of Law, numbers two through seven. He described the old law, the "mischief," and the remedy as follows:

2. Between 1921 and 1976, Article 2, Section 2 of the Indiana Constitution read as follows:

> In all elections not otherwise provided for by this constitution, every citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election, shall be entitled to vote in the township or precinct where he or she may reside.

3. The Twenty-Sixth Amendment to the United States Constitution, ratified July 5, 1971, lower[ed] the minimum age requirement for voting in all elections to eighteen, thus effectively modifying Article 2, Section 2 of the Indiana Constitution.

4. Dunn v. Blumstein, 405 U.S. 330 (1972) invalidated, under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Tennessee's durational residence requirements of twelve months in the state and three months in the County. The Court held unconstitutional all state voting requirements which called for a duration of residence longer than that necessary to complete the administrative tasks which state law required for registering voters and establishing eligibility lists for elections. Id., Affeldt v. Whitcomb, 319 F.Supp. 60 (N.D. Ind. 1970), aff'd, 405 U.S. 1034 (1972)

(invalidating Indiana's requirement of sixth months residency in the state); Jackson v. Bowen, 420 F. Supp. 315 (S.D. Ind. 1976) (invalidating Indiana's requirement of sixty days residency in the township).

5. Article 2, Section 2 of the Indiana Constitution was amended in 1976 to conform to federal constitutional limitations on state voting requirements as to age and duration of residence. The amended section read as follows:

> Every citizen of the United States, as of the age of eighteen years or more, who has been a resident of the precinct thirty days immediately preceding such election, shall be entitled to vote in the precinct where he or she may reside.

6. In 1976 the General Assembly passed a bill, House Enrolled Act 1239, which would have added to the election statutes prescribing residence requirements the following: "A voter's residence thirty-one (31) days before an election is deemed to be his residence from that day until the day after the election, any other provision of the laws of this state to the contrary notwithstanding." Governor Bowen vetoed that bill, stating in his veto message: "The residency requirements of Article 2, Section 2 of the Indiana Constitution can only be altered by amending that constitutional article." (1975 House of Representatives Journal, p. 1031 (April 30, 1975)). The General

> Assembly did not override the Governor's veto, therefore House Enrolled Act 1239 did not become law.
>
> 7. In 1984, the General Assembly again amended Article 2, Section 2 of the Indiana Constitution. This amendment included two changes. One, "Who has been a resident of the precinct" became "who has been a resident of a precinct." Two, "in the precinct where he or she may reside" became "in that precinct."

Record at 294-295.

The Election Board maintains that the slight alteration effected by the 1984 amendment was adopted as part of a broader resolution which merely proposed stylistic changes designed to make the Indiana Constitution more understandable

through the use of modern language.[4/] We think this interpretation is correct. Judge Metz also noted that after the 1984 amendment, the General Assembly in 1987 added subsections (b), (c) and (d) to Ind. Code § 3-7-8-2, to

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[4/] The 1984 constitutional amendment was initiated by the 102nd General Assembly in House Joint Resolution 1, entitled "A JOINT RESOLUTION proposing to amend the Constitution of the State of Indiana by updating certain antiquated style, language, or provisions." 1982 Ind.Acts P.L. 231. Amendments to thirty-four provisions of the Constitution were proposed. Many of the proposed amendments, including the amendment to Article II, § 2, adopted gender-neutral terms or removed all reference to gender. See, e.g., section 1 of Article II, changed from "all men are created equal" to "all people are created equal", Id. at § 2; section 16 of Article IV changed from "He shall take care that the laws be faithfully executed" to "The Governor shall take care that the laws are faithfully executed." Id. at § 20. (Emphasis added). Thus we are persuaded, inter alia, by the terms of the Joint Resolution and the de minimis nature of the alteration to Article II, § 2, that the General Assembly desired no substantive change.

preserve full voting rights for those such as Mouser who move to another precinct within the same county after the registration deadline.[5/] "If . . . Article 2, Section 2 of the Indiana Constitution establishes a 'record date', then the passage of [this legislation] would make no sense since the Indiana Constitution would already allow a voter to do this," wrote the judge. Record at 296. We concur.

This mischief to be remedied by these various amendments was clear: our legislature sought to make Indiana's constitutional provisions dealing with the franchise consistent with federal Constitutional mandates concerning minimum voting age and durational residency requirements. It also sought

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5/ 1987 Ind.Acts P.L. 3-1987, § 71.

to remove any gender bias that might be perceived in so important a document. The evidence does not reflect any change in policy toward those voters who change their residency in the waning days before an election. The trial court was correct in concluding that Article II, § 2 does not recognize a "record date" for purposes of establishing residency entitling one to vote.[6/]

III. Equal Protection Claims

Appellants next allege that the statute which limits voting rights of those who

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[6/] We note that the General Assembly may not confer voting rights on those not enfranchised by the Indiana Constitution. Board of Election Commissioners, etc. v. Knight (1917), 187 Ind. 108, 117 N.E. 565, 650. None of the parties to this litigation have the interest or the standing to contest the additional voting rights the legislature has granted to intra-county movers.

move after the registration deadline violates the equal protection clause of the United States Constitution.[7] The Court of Appeals, noting that "the right to vote has long been accorded the status of a fundamental right," utilized strict scrutiny in assessing the constitutionality of the statute. Gallagher, 579 N.E.2d at 652. The court concluded that the distinctions in voting rights did not promote any "compelling state interest" and hence were unconstitutional. Id. at 652-53.

The use of strict scrutiny in this context was error. While it is indisputable that the right to vote is fundamental and thus certain

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[7] U.S. CONST. amend. XIV, § 1. ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

encroachments trigger strict scrutiny, Dunn v. Blumstein, 405 U.S. 330 (1972), the Supreme Court has also made clear "that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68-9 (1972). The Supreme Court took for granted that a thirty-day residency requirement met the strict scrutiny test in Dunn. Later it upheld a fifty-day requirement upon a showing of a particularized need for time for administrative work. Marston v. Lewis, 410 US 679 (1973). As Justice Marshall pointed out in Dunn, the appropriate equal protection test varies, "depending upon the interest affected or the classification involved." Dunn, 405 US at 335. Appellants' right to vote is fundamental. They do not, however,

enjoy a fundamental right to vote in a precinct in which they do not reside. Thus we believe the appropriate inquiry is whether "any state of facts reasonably may be conceived to justify" the distinction in voting rights at issue in this case. Holt Civic Club, 439 U.S. at 74 (quoting Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 732 (1973)). Because Gallagher and Mouser represent different classes of partially disenfranchised voters -- those who move to a different county and those who move within a county -- we examine their claims separately, turning first to Gallagher.

A. Moving Across County Lines

Gallagher's complaint is not with the distinction drawn between his class of

voters and those who maintain continuous residency in a precinct and thus retain the full franchise. Rather, he attacks the disparate treatment his class endures compared to the accommodations provided by Ind. Code § 3-7-8-2 for those who move within a county. Gallagher, who merely moved across the county line, wonders why he is allowed to vote only for President and Vice President, while those who move on the same day to another precinct within the county have access to the entire ballot.[8/]

The Election Board argues persuasively in response that the legislature could have reasonably assumed that a move from

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8/ Of course, these intra-county movers must comply with the transfer affidavit requirements of Ind. Code § 3-7-8-2(c).

one precinct to another, within the same county, was less likely to result in a voter changing congressional or legislative districts and would be less likely to diminish the voter's legitimate interest in the local election, thus the disparate treatment of the two groups. The following hypotheticals further illustrate the reasonableness of the legislature's action:

Suppose a voter living in Marion County moves to another precinct in the county two weeks before Election Day. If he were allowed to vote in the new precinct, the ballot would look very much like the ballot in his old precinct. Perhaps he has moved into a different state legislative district, in which case that portion of the ballot would be different. But it is also

entirely possible that in spite of changing precincts, he would still remain in the same legislative districts. And, of course, the county offices on the ballot would be the same.

Now suppose the same voter, instead of moving to another precinct in Marion County, moves to Vanderburgh or St. Joseph or some other county far removed from the center of the state. He is far more likely to have moved into a new congressional district. His state legislative districts are certainly different. And he has lost any stake in local races in Marion County. Except for the fact that Gallagher moved a much shorter distance (to Hendricks County, adjacent to Marion County), he fits this example on all fours, and demonstrates why denial of the full franchise to his class is not unconstitutional. His

nexus to the community is more attenuated than that of voters who relocate within the borders of their home county.

Because Gallagher cannot meet the thirty-day durational residency requirement, his franchise can be abridged without offending the Constitution. See Dunn, 405 U.S. 330; Marston, 410 U.S. 679 (1973). Only his right to vote in the presidential election, originally mandated by Congress,[9/] is preserved. Admittedly, it does not seem fair that Gallagher, who remained a resident of the state, was not allowed to vote for Governor or U.S. Senator -- two races in which he retained a stake. Indeed, on the witness stand he said he could accept

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9/ See supra note 2.

restrictions on his right to vote for local offices, so long as his franchise with regard to statewide races was preserved. Record at 363. To paraphrase the declaration of the U.S. Supreme Court in Holt, Gallagher's suggestion "[f]rom a political science standpoint . . . may be sound, but this Court does not sit to determine whether [the General Assembly] has chosen the soundest or most practical" manner of safeguarding the ballot box and ensuring the integrity of elections. Holt, 439 U.S. at 73-4. Authority to make these judgments resides in the legislature, and Indiana citizens are "free to urge their proposals to that body." Id. at 74. The General Assembly might very well conceive a more precise system that protects a broader exercise of the franchise for voters like Gallagher while still preventing dilution of local

residents' votes, but the fourteenth amendment to the United States Constitution does not require it.

B. Moving Inside the County

Mouser's equal protection claim fails, as well. As an intra-county mover who failed to initiate the transfer of his registration in time to return to his old precinct and vote a complete ballot, Mouser claims a violation of equal protection based on the fact that those who complied with the requirements of the statute were accorded full voting rights and he was not. As an equal protection classification, this claimed distinction seems untenable, somewhat akin to a delinquent taxpayer who alleges an equal protection violation because he was unable to get to the Post Office by midnight on April 15th.

Nonetheless, we proceed to review Mouser's claim to determine if the statute passes the rational basis test.

Of controlling significance is the fact that Mouser could have executed the required transfer affidavit in time to vote in his old precinct, but failed to do so. See Rosario v. Rockefeller, 410 U.S. 752, 757 (1973). Mouser testified that after moving on October 27, 1988, he attempted to call the election office two or three times a day the week before the election but the line was busy each time he called. Record at 472, 474. By the time he went to the election office in person, on Monday the day before the election, it was too late to fill out the affidavit, since the deadline at the

time was the previous Friday.[10/] If Mouser's plight can be characterized as disenfranchisement at all, it was not caused by Ind. Code § 3-7-8-2, but by his own failure to take timely steps to fulfill its minimal requirements. Id. at 758.

It is apparent that the election office needs more phone lines, but that problem is not within our jurisdiction. We can, however, pass judgment on the constitutionality of state statutes, and it is our opinion that the statute Mouser challenges easily passes the rational basis test. Common sense dictates that administrative convenience is served by a system requiring transfer affidavits to be executed in the office

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10/ As the statute stands today, he would be timely. See supra note 3.

where the voting registration records are kept. And, at the very least, the statutory scheme at issue might help ensure that voters who move after the registration deadline actually inform the election office so a transfer of registration can be effected. Their franchise depends upon it. If voters like Mouser can be disenfranchised entirely, see Dunn, 405 U.S. 330; Marston, 410 U.S. 679, we find no constitutional violation in conditioning the dispensation of legislative grace on compliance with such a modest procedure.

The statutes do not violate equal protection guarantees. The trial court is affirmed.

DeBRULER, GIVAN, DICKSON, AND KRAHULIK, JJ., CONCUR.

[Filed April 6, 1990]

STATE OF INDIANA)		IN THE MARION
	) SS:	SUPERIOR COURT
COUNTY OF MARION)		CIVIL DIVISION
		ROOM ONE
		CAUSE NUMBER
		49D01-8810-CP1489

STEPHEN M. GALLAGHER, and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,

Plaintiffs,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY, and DONALD COX, in their official capacities as member of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause was tried before the Court on April 20, 1989, on Plaintiffs' "Second Amended Complaint for Preliminary and Permanent Injunctive

Relief, Money Damages, and For Declaratory Judgment (class action)", filed on December 1, 1988, and the Amended Intervening Complaint of Plaintiff Kevin Mouser filed on February 7, 1989. On February 9, 1990 the caption in the case was amended to include Alan Mills, Joseph Donnelly and Donald Cox, in their official capacities as members of the Defendant Indiana State Election Board. The central issue brought before the Court by the Plaintiffs concerns the legality, under both the Indiana and the United States Constitutions, of disfranchisement of registered voters who move from one precinct to another within a county within thirty days before an election.

This Court had previously heard evidence in this case in a hearing on Plaintiffs' first complaint and motion for preliminary injunction on November

1, 1988, and on Plaintiffs' second motion for class certification on January 31, 1989. The Court, on November 4, 1988, denied Plaintiffs' motion for preliminary injunction. By order entered February 21, 1989, the Court certified the case as a class action pursuant to Trial Rule 23(c)(1) for the purpose of final injunctive relief under Trial Rule 23(b)(2). The class is defined as those registered voters who move from their precinct of residence within Indiana to another precinct in Indiana within thirty days prior to an election, i.e. after the close of registration, but before the election itself. The class consists of two subclasses, defined as follows:

> Subclass A: all persons who are Indiana residents and are registered voters and who change their

residence from a precinct in one county to a precinct in another county thirty days or less prior to an election.

Subclass B: all persons who are Indiana residents and are registered voters and who change their residence from one precinct in a county to another precinct in the same county within thirty days or less prior to an election, and who fail or are unable to comply with the requirements of I.C. 3-7-8-2 as a condition of eligibility to vote in the precinct from which they moved.

The evidence and testimony presented at the previous hearings were consolidated with the evidence and testimony presented at the hearing on

the merits of Plaintiffs' current complaints on April 20, 1989.

The parties agree that the disfranchisement of the two subclasses of Plaintiffs resulted from Defendants' compliance with I.C. 3-7-8-2, I.C. 3-7-3-6, and I.C. 3-11-8-2. Additionally, the parties have entered into two lengthy stipulations concerning facts and documents, and the legislative history of an amendment to the Indiana Constitution and of certain bills addressing the eligibility of voters who move after the close of registration, as described in detail below.

This Court, having taken the matter under advisement, enters the following findings of fact, conclusions of law and judgment.

FINDINGS OF FACT

1. Pursuant to I.C. 3-7-3-5, the registration period for new voter registrations closes twenty-nine days before an election. Qualified voters who have lived in a precinct for thirty days before the date of election (I.C. 3-7-1-1), have until that time to register for purposes of voting in that election. For the general election of November 8, 1988, a voter could newly register or transfer the voter's registration not later than October 10, 1988, if the voter had established residence in the precinct by October 9, 1988.

2. On October 9 and 10, 1988, Plaintiff Stephen M. Gallagher ("Gallagher") resided at 2622 Shakespeare Drive, Perry Township, Indianapolis, Marion County, Indiana, 46227.

3. On October 10, 1988, Gallagher was a registered voter at the above address, which is in Precinct 20 of Marion County.

4. On October 11, 1988, Gallagher moved to 4653 Ridge Hill Way in Plainfield, Hendricks County, Indiana.

5. After moving to Hendricks County, but before the election, Gallagher contacted Defendant Marion County Board of Voter Registration to inquire whether, in order to vote in the 1988 general election, he needed to return to his former precinct or could simply have his registration transferred to his current precinct of residence in Hendricks County. The County Board informed Gallagher that in the upcoming election he would be allowed to vote only for the offices of President and Vice-President, and that he could not vote for any other offices (federal,

state, or local) or for any ballot propositions.

6. Gallagher then contacted the Defendant Indiana State Election Board and made the same inquiry. The State Board gave Gallagher the same response, i.e. that he would be allowed to vote only for the offices of President and Vice-President.

7. On November 8, 1988, Gallagher went to his former precinct and voted for the offices of President and Vice-President, but was not allowed to vote for any other offices or for any ballot propositions.

8. Gallagher is the representative of subclass A in this action.

9. On October 28, 1988, Plaintiff Kevin Mouser ("Mouser") resided at 1120 Steymie Court, Perry Township, Indianapolis, Marion County, Indiana, 46271.

10. On October 28, 1988, Mouser was a registered voter at the above address, which is in Precinct 6 of Marion County.

11. On October 29, 1988, Mouser sold his home and moved to an apartment at 4052 Malden Lane, Beech Grove, Indiana, 46107. He was thus still a resident of Marion County, but of a different precinct.

12. On November 7, 1989, Mouser went to the Board of Voter Registration's office to inquire whether he was supposed to vote at his former precinct or at his current precinct. He was told that he could go to his former precinct to vote, but that he would be allowed to vote only for the offices of President and Vice-President. At the Registration Board office, Mouser completed an affidavit to vote for President and Vice-President.

13. On November 8, 1988, Mouser went to his former precinct and voted for the offices of President and Vice-President, but was not allowed to vote for any other offices or any ballot propositions.

14. Mouser had been a registered voter in his former precinct for the past five years and had voted in every election during that time.

15. Plaintiff Mouser is the representative of subclass B in this action.

16. Defendant Indiana State Election Board, established pursuant to I.C. 3-6-4, is responsible for administering the election laws of the State of Indiana and performing all duties relating to the conduct of elections in Indiana, such as prescribed in I.C. 3-6-4-12 and other applicable statutes.

17. Defendant Marion County Election Board, established pursuant to I.C. 32-6-5, is responsible for conducting all elections in Marion County and for performing the duties prescribed in I.C. 3-6-5-14 and other applicable statutes.

18. Defendant Marion County Board of Voter Registration, established pursuant to I.C. 3-7-2-2, is responsible for registering voters in Marion County according to the Indiana Election Code (I.C. 3-7) and other applicable statutes.

19. The Deposition of Janet E. Richhart ("Richhart") was published and admitted into evidence. Ms. Richhart is the Republican member of the Marion County Board of Voter Registration and had previously been its Chief Deputy since February, 1983. Richhart Depo. 5-7.

20. The Deposition of Bonny Maupin ("Maupin"), administrator of the Marion County Election Board for the past eight years (Maupin Depo. 8), was published and entered into evidence. As administrator of the Marion County Election Board, Maupin is responsible for candidate filings, applications for absentee ballots, credentials of precinct election officials and supervision of poll workers. Maupin Depo. 6-8.

21. As I.C. 3-7-8-13 requires, the various county boards of voter registration communicate with each other, including notifying each other to cancel the previous registration of voters who have moved out of a county and re-registered in a new county. Pichhart Depo. 18-20.

22. Door to door voter registration closes forty-six days prior to an

election and office registration closes twenty-nine days prior to an election. Richhart Depo. 22; I.C. 3-7-3-5.

23. All of the registrations, including affidavits of registration, of those voters registering earlier than thirty days before the election are bound into precinct binders and the information contained therein is printed in "poll books". Both the precinct binders and the poll books are distributed to precinct officials for use on election day. Richhart Depo. 23-24; I.C. 3-7-7-6 through 3-7-7-8.

24. Because they were registered in their former precincts thirty days before the election, the registrations of Plaintiffs Gallagher and Mouser appeared in the precinct binders and poll books of their former precincts. Richhart Depo. 23-24; I.C. 3-7-7-7.

25. On election day, poll workers check these precinct binders and poll books to determine the voting eligibility of persons who present themselves at the polling sites. Maupin Depo. Exhibit 8 (instructions to inspectors).

26. Members of subclass A may not register to vote in their new precinct of residence. Voter registration officials direct them to go to their former precinct in their former county, where they may vote for the offices of President and Vice-President only. Richhart Depo. 27. There they must fill out a prescribed affidavit to qualify to vote in that election only for the offices of President and Vice-President. Execution and submission of this special affidavit serves to cancel the voter's previous registration in that precinct. Richhart Depo. 35-37.

27. Registered voters who move within 30 days before an election to a new precinct within the same county (subclass B) are permitted to apply for transfer of their registrations up to the Friday before the election by going to the office of the County Board of Voter Registration (or the County Clerk in counties having no Board of Registration) and signing an "Affidavit of Voter Transfer Within Thirty Days of Election", which requests that the voter's registration be transferred to the new precinct of resident. Maupin Depo. 42-43; Richhart Depo. 43-48; I.C. 3-7-8-2. The voter must then present this affidavit to election officials at the polling site of the voter's former precinct. The voter may then use the voting machines (or paper ballots where applicable) to vote for all offices and ballot propositions.

Maupin Depo. 43, 45-46, Maupin Exhibit 9; Richhart Depo. 43-44, Richhart Depo. Exhibit 4 Bond 4 C; I.C. 3-7-8-2.

28. When voters who move after the close of registration go to the office of the Board of Registration to complete an application to transfer their registration, officials check to see whether the person was registered at the previous address. Richhart Depo. 48. Poll books and poll lists, which precinct election officials use at the polls on election day, contain the very same information.

29. ~~Members of~~ the subclass B who fail to complete a registration transfer application at the Board of Voter Registration by the Friday before the election may vote only for the offices of President and Vice-President on election day (after signing the

appropriate affidavit). Richhart Depo. 50.

30. The affidavits required of all members of subclasses A and B for voting only for the offices of President and Vice-President may be completed either at the polling site of the former precinct (on election day), at the Board of Voter Registration (on election day or before election day), or when applying for an absentee ballot. Richhart Depo. 51-52; I.C. 3-7-4-3. If the affidavit is completed before election day, the person may vote absentee if otherwise qualified. Richhart Depo. 30, 38; I.C. 3-11-4-1.

31. A registered voter who moves within the same precinct within thirty days before an election need not complete any forms in order to vote in the upcoming election. These voters need only note their new address in the

"Poll Book" on election day. The County Clerk or County Board of Registration prepares the poll book for use by poll workers on election day. It lists all registered voters in a precinct. Maupin Depo. 65; Depo. Exhibit 11; Richhart Depo. 61; I.C. 3-7-8-15.

32. Poll books containing these written-in changes of address are returned to the Circuit Court Clerk or County Board of Registration, which must then "correct the address of the voter on the county's permanent voter registration records." I.C. 3-7-8-15.

33. Subclass A and subclass B members are allowed to vote for President and Vice-President only on the day of election and only at their former precinct, in person or by absentee ballot. Maupin Depo. 25; I.C. 3-7-4. They may not, as other voters do, use the voting machines to vote, but rather

must use paper ballots, because they may not vote on the full slate of offices and propositions.

34. Plaintiffs allege that Article 2, Section 2, of the Indiana Constitution establishes a "record date" with respect to a voter's right to vote within a precinct rather than establishing a residency requirement of thirty (30) days to vote within that precinct.

35. Plaintiffs allege that if a voter was a resident of a precinct on the thirtieth (30th) day immediately preceding an election, that that voter has the right to vote in that precinct even though he or she may have moved from that precinct within the thirty (30) day period prior to the election.

36. Any of the foregoing findings of fact which constitutes or includes a

conclusion of law shall be deemed to be a conclusion of law.

CONCLUSIONS OF LAW

1. Article 2, Section 2 of the Indiana Constitution establishes the qualifications which Indiana residents must meet in order to vote for members of the United States Congress. These qualifications are based on the qualifications which Indiana residents must meet in order to vote for members of the Indiana House of Representatives, but, in addition, are subject to all of the restrictions, regulations and requirements which federal law establishes for the election of the President and Vice-President and of members of Congress. U.S.Const. Art.1, Sec. 2, cl.1; Id. Amendment 17; Id. Art.I,Sec.4; Oregon v. Mitchell, 400 U.S. 112, 119-125 (1970)

2. Between 1921 and 1976, Article 2, Section 2 of the Indiana Constitution read as follows:

> In all elections not otherwise provided for by this constitution, every citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election, shall be entitled to vote in the township or precinct where he or she may reside.

3. The Twenty-Sixth Amendment to the United States Constitution, ratified July 5, 1971, lowers the minimum age requirement for voting in all elections to eighteen, thus effectively modifying Article 2, Section 2 of the Indiana Constitution.

4. Dunn v. Blumstein, 405 U.S. 330 (1972) invalidated, under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Tennessee's durational

residence requirements of twelve months in the state and three months in the County. The Court held unconstitutional all state voting requirements which called for a duration of residence longer than that necessary to complete the administrative tasks which state law required for registering voters and establishing eligibility lists for elections. Id. Affeldt v. Whitcomb, 319 F.Supp. 60 (N.D. Ind. 1970). aff'd, 405 U.S. 1034 (1972) (invalidating Indiana's requirement of six months residency in the state); Jackson v. Bowen, 420 F. Supp. 315 (S.D. Ind. 1976) (invalidating Indiana's requirement of sixty days residency in the township).

5. Article 2, Section 2 of the Indiana Constitution was amended in 1976 to conform to federal constitutional limitations on state voting requirements

as to age and duration of residence. The amended Section read as follows:

> Every citizen of the United States, as of the age of eighteen years or more, who has been a resident of the precinct thirty days immediately preceding such election, shall be entitled to vote in the precinct where he or she may reside.

6. In 1976 the General Assembly passed a bill, House Enrolled Act 1239, which would have added to the election statutes prescribing residence requirements the following: "A voter's residence thirty-one (31) days before an election is deemed to be his residence from that day until the day after the election, any other provision of the laws of this state to the contrary notwithstanding". Governor Bowen vetoed that bill, stating in his veto message: "The residency requirements of Article 2, Section 2 of the Indiana Constitution can only be altered by amending that constitutional article." (1975 House of

Representatives Journal, p. 1031 (April 30, 1975)). The General Assembly did not override the Governor's veto, therefore House Enrolled Act 1239 did not become law.

7. In 1984, the General Assembly again amended Article 2, Section 2 of the Indiana Constitution. This amendment included two changes. One, "who has been a resident of the precinct" became "who has been a resident of a precinct". Two, "in the precinct where he or she may reside" became "in that precinct". The amended Section read as follows:

> Every citizen of the United States, of the age of eighteen (18) years or more, who has been a resident of a precinct thirty (30) days immediately preceding such election, shall be entitled to vote in that precinct.

8. Subsequent to the most recent amendment to Article 2, Section 2, the General Assembly has amended the

Election Code to permit some registered voters who had changed their precincts of residence after the last designated day for transferring registration to vote at their former precinct. In 1987, the General Assembly passed Senate Enrolled Act 293 which became law, when approved by the Governor, as P.L. 3-1987. Sec. 71 of that statute (amended by P.L. 10-1988 Sec. 20) added subsections (b), (c) and (d) to I.C. 3-7-8-2, thereby establishing a procedure whereby a previously registered voter who had changed his or her residence from one precinct in a county to another precinct in the same county within the thirty days before an election (i.e. members of subclass B) could still vote for all offices and propositions on the ballot of his or her former precinct of residence. (While there may be some question as to the

validity of this statute in light of Article 2, Section 2 of the Indiana Constitution, the issue of this statute's validity is not before this Court.)

9. After reviewing the history of Article 2, Section 2 of the Indiana Constitution, this Court is of the opinion that a voter is required to be a resident of a precinct for the thirty (30) days immediately preceding an election and not just a resident on the thirtieth (30th) day preceding the election.

10. Article 2, Section 2 has always dealt with "duration of residency" and the time periods have been amended based upon cases which have held certain "duration of residency" requirements unconstitutional.

11. House Enrolled Act 1239, which was passed by the General Assembly in

1975 but vetoed by the Governor, would have established a "record date" criteria for establishing a voter's right to vote in a certain precinct, but the Governor properly concluded that such an Act would change the residency requirements as set forth in the Indiana Constitution. In essence, the Plaintiffs are asking this Court to do what the 1975 General Assembly attempted to do, change the residency requirement of the State's Constitution.

12. As further proof that Article 2, Section 2 requires thirty (30) days of residence in a precinct rather than residency in the precinct on the thirtieth (30th) day before an election, the 1987 General Assembly passed Senate Enrolled Act 293 which permitted a voter who had moved from one precinct in a county to another precinct in a county, within thirty (30) days of an election,

to vote in his or her former precinct. If Plaintiffs' argument that Article 2, Section 2 of the Indiana Constitution establishes a "record date", then the passage of Senate Enrolled Act 293 would make no sense since the Indiana Constitution would already allow a voter to do this.

13. The Court, having found that Article 2, Section 2 of the Indiana Constitution requires a person to be a resident of a precinct for thirty (30) days immediately preceding an election, now finds that a thirty (30) day residency requirement does not violate the United States Constitution.

14. After registration closes, election boards use the thirty (30) days to prepare precinct binders and poll books to be used at the various precincts on election day.

15. The United States Supreme Court has held that states may take up to thirty (30) days to complete administrative tasks to insure against voting fraud:

> "Moreover, to the extent that the State makes an enforcement effort after the oath is sworn, it is not clear what role the durational residence requirement could play in protecting against fraud. The State closes the registration books thirty days before an election to give officials an opportunity to prepare for election. Before the books close, anyone may register who claims that he will meet the durational resident requirement at the time of the next election. Although Tennessee argues that this 30 day period between registration and election does not give he State enough time to verify this claim of bona fide residence, we do not see the relevance of that position to this case. As long as the State permits registration up to 30 days before an election, a lengthy durational residence requirement does not increase the amount of time the State has in which to carry out an investigation into the sworn claim by the would-be voter that he is in fact a resident.
>
> . . .
>
> Fixing a constitutionally acceptable period is surely a matter of degree.

> It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud - and a year, or three months too much. (emphasis added)

Dunn v. Blumstein, supra, 92 S.Ct., at 1005-1006.

16. While Plaintiffs have argued that other states have less restrictive residency requirements than Indiana, and these states have not experienced significant amounts of voter fraud, the Court finds that this argument has nothing to do with the constitutionality of Indiana's residency requirement.

17. Since the United States Superior Court has ruled that a thirty (30) day residency requirement does not violate the United States Constitution, the fact that other states may have less restrictive residency requirements does not impact the validity of Indiana's thirty (30) day requirement.

JUDGMENT

Based upon the findings of fact and conclusions of law entered herein, the Court hereby enters the following judgment:

1. That the law of this case is with the Defendants and against the Plaintiffs.

2. That the challenged provisions of the Indiana Election Code, to-wit: I.C. 3-7-8-2, I.C. 3-7-3-6, and I.C. 3-11-8-2 do not violate the Indiana Constitution or the United States Constitution.

3. That judgment is hereby entered in favor of the Defendants and against the Plaintiffs.

Anthony J. Metz, III, Judge
Marion County Superior Court
Civil Division, Room One

cc: Richard A. Waples, Esq.
John Wood, Esq.
Andrew P. Wirick, Esq.
Arthur Thaddeus Perry, Esq.
Gary Landau, Esq.

A-63

[Filed October 16, 1991]

IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

STEPHEN M. GALLAGHER, and KEVIN MOUSER, individually and representatives of all other individuals similarly situated,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A02-9007-CV-431
INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY, and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD, MARION COUNTY ELECTION BOARD, and MARION COUNTY BOARD OF VOTER REGISTRATION,	)	
Appellee-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM 1
The Honorable Anthony M. Metz III, Judge
Cause No. 49D01-8810-CP-1489

SHIELDS, J.

Stephen M. Gallagher and Kevin Mouser, individually and as representatives of all other individuals similarly situated, appeal the trial court's judgment holding voting provisions of the Indiana Code do not violate the Indiana Constitution or the United States Constitution.

We reverse and remand for further proceedings.

ISSUES

1. Whether Ind. Const. art. 2, § 2 creates a "day of record" for purposes of voting, whereby the precinct in which

a voter maintains residency within the state on the thirtieth day prior to an election is that voter's voting precinct, even if the voter moves from that precinct prior to the election.

2. Whether the statutory provisions that differentiate between the franchise allowed registered voters who move to a new voting precinct within thirty days of an election violate the Equal Protection Clause of the United States Constitution.

BACKGROUND

A voter who moves to a new precinct must have his or her registration transferred to the new precinct no later than the twenty-ninth day prior to the date of an election to enable the voter to vote in the new precinct. See IC 3-7-3-5 (1991 Supp.). As a result, a resident of a voting precinct who is otherwise qualified cannot vote in the

new precinct if he or she became a precinct resident within thirty days prior to an election. However, the new precinct resident may vote for certain offices and ballot issues in his or her former precinct. If the registered voter moves to a new precinct in another county, the franchise is limited to the offices of President and Vice President at the former precinct. See IC 3-7-4-1 et seq. (1988). If the registered voter moves to a new precinct within the same county and requests a transfer of registration before 4:00 p.m. on the last Monday prior to the election, the franchise at the former precinct is unlimited--the voter is allowed to vote for all offices and ballot issues at the voter's former precinct. See IC

3-7-8-2(c) (1991 Supp.).[1/] However, if a voter who moves to a new precinct within the same county either fails to make a timely request for transfer or is unable to make a timely request for transfer (e.g., moves to the new precinct after the transfer deadline), the voter is allowed to vote in his or her former precinct only for the offices of President and Vice President. See IC 3-7-4-1 et seq. (1988).

FACTS

Appellants Gallagher and Mouser represent the class of voters who move to a new precinct within thirty days prior to an election and are limited to voting for the offices of President and

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[1/] IC 3-7-8-2(c) was amended in 1991. Prior to that time, the deadline for intra-county movers to request a registration transfer was the last Friday before the election. See IC 3-7-8-2(c) (1988).

Vice President at their former precincts.

Stephen M. Gallagher was a resident and registered voter of Precinct 20 in Marion County. After Gallagher moved to Hendricks County on October 11, 1988, he contacted the Marion County Board of Voter Registration and the Indiana State Election Board and asked where he would be voting that year. Gallagher was told he would have to return to Marion County where he would be allowed to vote only for the offices of President and Vice President. On November 8, 1988 Gallagher voted for President and Vice President at Precinct 20 in Marion County. Gallagher represents himself and subclass A: persons who are Indiana residents and are registered voters who change their residence from a precinct in one county to a precinct in another

county on or within thirty days of an election.

Kevin Mouser was a resident and registered voter of Precinct 6 in Marion County. On October 29, 1988 Mouser moved to another precinct in Marion County. On Monday, November 7, 1988 Mouser informed the Board of Voter Registration of his change of address and was told that in order to vote he would have to execute an affidavit and return to his former precinct where he could vote only for the offices of President and Vice President.[2/] Mouser represents himself and subclass B: persons who are Indiana residents and

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[2/] At the time Mouser notified the Board of Voter Registration, the deadline for requesting a registration transfer, which if timely made would have allowed Mouser to return to his former precinct and exercise an unlimited franchise, was the last Friday before the election. See footnote 1, supra.

are registered voters who change their residence from one precinct in a county to another precinct in the same county on or within thirty days of an election and who fail or are unable to comply with the provisions of the Indiana Code which allow intra-county movers to return to their former precinct and vote for all offices and ballot issues.

The Defendant-Appellees (collectively referred to as the Election Board) are: the Indiana State Election Board, which is established under IC 3-6-4-1 et seq. (1988) and is responsible for administering the election laws of the State of Indiana and other duties relating to the conduct of elections in Indiana; Alan Mills, Joseph Donnelly, and Donald Cox in their official capacities as members of the Indiana State Election Board; the Marion County Election Board, which is

established pursuant to IC 3-6-5-1 et seq. (1988) and is responsible for conducting all elections in Marion County and for performing duties prescribed in IC 3-6-5-14 (1991 Supp.) and other applicable statutes; and the Marion County Board of Voter Registration, which is established pursuant to IC 3-7-2-2 (1991 Supp.) and is responsible for registering voters in Marion County according to the Indiana Election Code and other applicable statutes.

Gallagher originally brought this action prior to the 1988 election, complaining the limited franchise afforded him violates the Indiana Constitution and the United States Constitution. At that time, he requested a preliminary injunction against the Marion County Election Board to allow him to exercise the full

franchise at his former precinct in the 1988 election, which the trial court denied. After the election, Mouser intervened as an additional plaintiff and joined Gallagher in the present class action suit seeking declaratory and permanent injunctive relief, damages, costs and attorney fees. The trial court held that the challenged statutory provisions violate neither the Indiana Constitution nor the United States Constitution.

DISCUSSION

I.

Gallagher and Mouser argue the Indiana Code provisions that limit the franchise of the two subject subclasses violate Ind. Const. art. 2, § 2. The central issue concerning their claim is the meaning of Ind. Const. art. 2, § 2, which provides:

> Every citizen of the United States, of the age of eighteen

> (18) or more, who has been a resident of a precinct thirty (30) days immediately preceding such election, shall be entitled to vote in that precinct.

Gallagher and Mouser argue this language creates a "day of record" whereby the precinct in which a registered voter resides on the thirtieth day prior to an election is that voter's voting precinct, even if the voter moves to a different precinct prior to the election. To support this argument, Gallagher and Mouser emphasize the legislative history surrounding Ind. Const. art. 2, § 2. The Election Board, however, argues the language in Ind. Const. art. 2, § 2 is not ambiguous and thus, construction based on its legislative history is unwarranted and inappropriate. It reads Ind. Const. art. 2, § 2 as unequivocally requiring precinct residency for thirty <u>continuous</u> days prior to an election.

In determining the meaning of Ind. Const. art. 2, § 2, we first decide whether the provision is plain and unambiguous and thus not in need of construction. See, e.g., Superior Construction Co. v. Carr (1990), Ind., 564 N.E.2d 281, 284 (courts do not interpret legislation that is clear and unambiguous on its face); Burks v. Bolerjack (1981), Ind., 427 N.E.2d 887, 889 (the use of rules of statutory construction is not warranted where the language is unambiguous). The key language at issue is: "Every citizen . . . Who has been a resident of a precinct thirty (30) days immediately preceding such election . . . ." Ind. Const. art. 2, §2. The phrase "has been a resident . . . thirty (30) days" indicates the criterion involves a period of time rather than a specific point in time. Thus the language of

Ind. Const. art. 2, § 2 is unambiguous and clearly does not provide a "day of record" for purposes of voting and to that extent we agree with the trial court.

II.

Gallagher and Mouser also argue the voting right their subclasses receive under the statutory scheme, when compared to the voting right given other voters who move to a new precinct within thirty days of an election, violates the Equal Protection Clause of the United States Constitution.

The parties disagree over the level of scrutiny that should be employed in assessing the constitutionality of the distinction drawn between the subclasses that Gallagher and Mouser represent and those registered voters who move to a new precinct within thirty days prior to an election who retain their full

franchise. Gallagher and Mouser argue voting is a fundamental right and strict equal protection scrutiny is required. The Election Board argues the Supreme Court's decision in Holt Civic Club v. City of Tuscaloosa (1978), 439 U.S. 60, requires application of low-level equal protection scrutiny in this case. However, the Court's rationale for applying low-level equal protection scrutiny in Holt is not relevant to this case. The distinction in voting rights at issue in Holt was based on the residency of one group that was not allowed to vote. Although the Indiana Constitution defines the right to vote in terms of precinct residency, the voters who enjoy the right to return to their former precinct and exercise an unlimited franchise are, like Gallagher and Mouser, not residents of the precinct in which they vote. Therefore,

the lack of precinct residency cannot justify the distinction in voting rights created by the statutory provisions at issue and provides no basis for employing low-level equal protection scrutiny in this case.

We hold the proper standard is strict scrutiny. The right to vote has long been accorded the status of a fundamental right. See Dunn v. Blumstein (1972), 405 U.S. 330, 336 (describing the right to vote as "'a fundamental political right . . . preservative of all rights'"). It is this right that Gallagher and Mouser seek, wherever they may exercise it. Therefore, we must determine whether the Indiana Code's distinctions in voting rights provided to similarly situated groups are necessary to promote a compelling state interest. See Id. at 337.

We are unaware of any compelling state interest and the Election Board has not offered one to explain the distinction between the voting rights provided the voters Gallagher and Mouser represent and those voters who move to a new precinct within thirty days of an election whose franchise is unlimited. Consequently, the statutory provisions that create the varying voting rights cannot survive strict equal protection scrutiny and are unconstitutional.

Even if low-level equal protection analysis was appropriate in this case, we would find the statutory provisions Gallagher and Mouser challenge violate the Equal Protection Clause. To survive low-level equal protection scrutiny, the distinction created by the statutory provisions needs only to be rationally related to a legitimate state interest. Pennell v. City of San Jose (1988), 485

U.S. 1, 14. A statutory distinction between groups will survive low-level equal protection scrutiny if "any set of facts reasonably may be conceived to justify" the distinction. Holt, 439 U.S. at 74. The Election Board has attempted to explain the distinction by claiming the distinction is justified, at least with respect to the variance between intra-county and inter-county movers, by the legitimate state interest in administrative convenience. According to the Election Board, voters who move intra-county and make a timely request for transfer of registration will have their transfer handled by only one county voter registration office, whereas those who move inter-county must have their transfer handled by two county voter registration offices. However, the county voter registration offices do not act on transfer requests

prior to the election. Because any administrative convenience in transferring the intra-county movers' registration would occur only after the election has taken place, the administrative convenience justification bears no rational relationship to the distinction in voting rights between voters who move intra-county and made a timely transfer request and either of the subclasses Gallagher and Mouser represent. Further, we cannot conceive

any legitimate state interest that would justify such a distinction.[3/]

We hold the sections of the Indiana Code that limit the franchise of an otherwise qualified voter who moves to a new precinct within thirty days of an election to voting for only the President and Vice President are unconstitutional under the Equal Protection Clause. Therefore, the judgment of the trial court is reversed and the cause remanded to the trial court with instructions to enjoin the

---

[3/] The Election Board also argues the subclass represented by Mouser cannot raise its equal protection challenge because members of the subclass failed to make a timely registration transfer request, and thus were responsible for their own disenfranchisement. We note that the subclass Mouser represents includes not only those who fail to make a timely request but also those who cannot make a timely request (e.g., those who move after the deadline expires). See Record at 288. Therefore, we need not discuss this argument.

Election Board from enforcing those provisions and to consider Gallagher's and Mouser's claims for additional relief.

STATON, J., CONCURS.

BUCHANAN, J., CONCURS.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.
(Equal Protection Clause)

Section 1. . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF INDIANA

ARTICLE II.
(Suffrage and Election)

§ 2. Voting qualifications

Section 2. Every citizen of the United States, of the age of eighteen (18) years or more, who has been a resident of a precinct thirty (30) days immediately preceding such election, shall be entitled to vote in that precinct.

§ 14. Time of elections; judges of courts; registration of voters

Section 14. All general elections shall be held on the first Tuesday after the first Monday in November; but

township elections may be held at such time as may be provided by law: Provided, That the General Assembly may provide by law for the election of all judges of courts of general and appellate jurisdiction, but an election to be held for such officers only, at which time no other officer shall be voted for, and shall also provide for the registration of all persons entitled to vote.

INDIANA ELECTION CODE

3-5-2-40 "Precinct"

Section 40. "Precinct" means a subdivision of a county or township established for election purposes.

3-6-5-14 Powers and duties

Sec. 14. Each county election board, in addition to duties otherwise prescribed by law, shall:

(1) except as provided in IC 3-8-5 and IC 3-10-7 for town conventions and

municipal elections in certain small towns, conduct all elections and administer the election laws within the county;

(2) prepare all ballots except those prepared by the state election board; and

(3) distribute all ballots and posters to all of the precincts in the county.

3-7-3-1 Registration record; precinct registration affidavits and forms

Sec. 1. The registration affidavits or forms of each precinct constitute a permanent registration record of all voters residing in and entitled to vote in the precinct. The permanent registration record shall be compiled, purged, supplemented, and preserved as prescribed by this article.

3-7-3-2 One-time registration

Sec. 2. A voter who is a resident of a precinct and whose name appears on the registration record of the precinct is not required to register again, as long as:

(1) the voter continues to reside at the same address at which the voter is registered;

(2) the voter is not disfranchised according to law; and

(3) the voter's registration is not cancelled as provided in this title.

3-7-3-5 Persons required to register; registration period

Sec. 5. (a) During each registration period only those voters whose names do not appear on the registration record of the proper precincts of a county, as provided in this article, must register or transfer a previous registration.

(b) The registration period begins on the first business day of December of each year in which a general or municipal election is held. The period continues through the twenty-ninth day before the date fixed by this title for a primary election. The period resumes on May 15 and continues through the twenty-ninth day before the date on which the general or municipal election will be held. A deputy registration officer may not receive registrations and transfers after the forty-fourth day preceding the date fixed by this title for a primary, general, or municipal election.

(c) A person desiring to register or transfer may do so at the principal office of the circuit court clerk or board of registration through the twenty-ninth day.

3-7-3-6 Entitlement to vote

Sec. 6. (a) A voter whose name appears on the registration record of the precinct of which the voter is a legal resident, and who is otherwise qualified, is entitled to vote at a general or municipal election.

(b) A voter whose name does not appear on the registration record may not vote, unless the circuit court clerk or board of registration provides a signed certificate of error in the office where the permanent registration record is kept showing that the voter is legally registered in the precinct where the voter resides.

CHAPTER 4

SPECIAL REGISTRATION PROCEDURES FOR PRESIDENTIAL ELECTIONS

3-7-4-1 Presidential voting procedures

Sec. 1. Notwithstanding other provisions of this article concerning

residency requirements for voting, special procedures apply for voting in presidential elections. The presidential voting procedures in this chapter apply only to a general election at which electors for President and Vice President of the United States are voted upon.

3-7-4-2 Application

Sec. 2. The presidential voting procedures in this chapter apply to a person who:

(1) resided in a precinct in Indiana;

(2) lost residency under IC 3-7-1 within the thirty (30) days immediately before the general election;

(3) was a qualified and registered voter while a resident of that precinct; and

(4) does not meet the residency requirements of the state, precinct, or

political subdivision in which the person resides.

3-7-4-3 Voting affidavit; place of execution

Sec. 3. The affidavit required under section 6 of this chapter for voting in presidential elections may be executed only:

(1) at the principal office of the circuit court clerk or board of registration before the day of the general election;

(2) before the precinct election board of the precinct where the person formerly resided, if the affidavit is executed on the day of the general election; or

(3) when the application for an absentee ballot is filed.

3-7-4-4 Marking of affidavits, forms and records

Sec. 4. All affidavits, forms, and records of voter registration must be

clearly marked to indicate that, in this general election, the voter may only vote for electors for President and Vice President of the United States.

3-7-4-5 Contents of affidavit

Sec. 5. The affidavits for presidential voting under this chapter must contain the following information:

(1) The voter's last, first, and middle name, in that order.

(2) The voter's assigned identification number.

(3) The voter's birthplace and date of birth.

(4) If the voter is a naturalized foreign born citizen, the date and place of naturalization and the court in which naturalized.

(5) If the voter resides in a municipality, the ward and precinct and the street address, including apartment number or other designation, or the name

and room number of the hotel or lodging house. If the voter resides outside of a municipality, the township and precinct and the voter's address.

3-7-4-6 Voter's statement

Sec. 6. A voter must also sign the following statement to vote under this chapter:

I swear (or affirm) that to the best of my knowledge and belief:

(1) I am a citizen of the United States;

(2) on general election day I will be at least eighteen (18) years of age;

(3) I have resided in Indiana but have lost my residency in the precinct where I resided not more than thirty (30) days before the election;

(4) I will not meet the residency requirements of the state, precinct, or political subdivision in which I now reside;

(5) I am otherwise legally qualified to vote;

(6) I am not registered in the precinct of my present residence; and

(7) I will only be qualified to vote for Electors for President and Vice President of the United States in this general election.

3-7-7-9 Registration list

Sec. 9. Not later than ten (10) days before the election at which the registration record is to be used, the circuit court clerk or board of registration shall prepare certified copies of the list of registered voters for each precinct in the county. The lists must contain the full name, address, and assigned identification number of each registered voter. The names shall be arranged in the same order as they are in the registration record of the precinct.

3-7-8-1 Change of residence; transfer form

Sec. 1. Upon a change of residence, a voter shall transfer the voter's registration to the voter's new address by sending a transfer on a prescribed form to the circuit court clerk or board of registration or by applying in person for a transfer. The transfer form shall be provided by the clerk or board and shall be executed as prescribed by this chapter.

3-7-8-2 Time of transferring registration; transfers within county

Sec. 2. (a) Subsections (c) through (e) do not apply to a voter who changes residence from a precinct located outside a city to a precinct within a city within thirty (30) days before a municipal primary election, municipal election, or special election held only within the city.

(b) A voter may transfer registration at any time during the registration period prescribed in IC 3-7-3-5 at the office of the circuit court clerk or board of registration for the county in which the voter resides, or with any of the deputy registration officers appointed by the clerk or board.

(c) A voter who changes residence from one (1) precinct to another within the same county within thirty (30) days before an election may request a transfer of registration at the office of the circuit court clerk or board of registration for the county in which the voter resides, or at a registration substation established by the clerk or board in that county under IC 3-7-3-20. A request for a transfer under this subsection:

(1) may not be made after 4 p.m. on the Monday before election day; and

(2) is effective to the same extent as if it had been completed under subsection (b).

(d) When the circuit court clerk or board of registration receives a request for the transfer of a voter's registration under subsection (c), the voter must execute an affidavit in a form prescribed by the state election board. The affidavit must:

(1) state that the voter has changed residence from one (1) precinct to another within that county within thirty (30) days before an election;

(2) state that the voter has filed an application with the clerk or board requesting that the voter's registration be transferred by the clerk or board to the precinct where the voter now resides as soon as the transfer is permitted

under subsection (b); and

(3) be signed by the voter.

(e) A voter who requests a transfer of registration under subsection (c) may vote at the precinct where the voter resided thirty (30) days before election day if:

(1) the voter furnishes a copy of the affidavit described in subsection (d) to the precinct election board or attaches the affidavit to the voter's absentee ballot; and

(2) the voter is otherwise qualified to vote in the election.

(f) the clerk or board shall receive and execute transfers during regular office hours.

3-7-8-15 Transfer of registration at polls

Sec. 15. In an election if a person who is registered to vote in a precinct:

(1) resides at an address in the precinct other than the address stated in the poll list or other registration records available to the precinct election board; and

(2) complies with:

(A) section 2 of this chapter; or

(B) IC 3-10-1-9 or IC 3-11-8-22, if challenged under IC 3-10-1-9 or IC 3-11-8-20;

the person shall be allowed to vote at the polls. However, before allowing the person to vote, a precinct election officer shall require the person to write the person's correct address on the poll list if that address is different from the address shown on the poll list and is located in that precinct. The circuit court clerk or board of registration shall, upon the return of the poll list from the precinct, correct the address of the

voter on the county's permanent voter registration records. This section does not apply to a person who votes by absentee ballot.

3-11-1.5-3 Number of voters per precinct

Sec. 3. (a) Except as provided in:

(1) subsection (b);

(2) subsection (c);

(3) section 3.2 of this chapter; or

(4) section 3.5 of this chapter;

a county executive shall establish precincts so that a precinct contains no more than eight hundred (800) voters.

(b) This subsection applies to a precinct that includes:

(1) an entire township, but does not cross a township boundary in violation of section 4 of this chapter;

(2) an entire city legislative body district, but does not cross the

boundary of a city legislative body district;

(3) an entire town legislative body district, but does not cross the boundary of a town legislative body district; or

(4) one (1) residential structure containing more than eight hundred (800) voters and no other residential structure containing voters.

In changing precincts or establishing new precincts, a county executive shall arrange a precinct so that it will contain no more than one thousand two hundred (1,200) voters.

(c) A county executive is not required to establish precincts so that a precinct contains not more than eight hundred (800) voters if the precinct:

(1) was established by the county executive in compliance with subsection

(a) within the preceding twenty-four (24) months; and

(2) contains not more than one thousand (1,000) voters.

3-11-1.5-4 Boundaries; arrangement to prevent crossing other boundaries

Sec. 4. A county executive shall establish precincts so that each boundary of each precinct does not cross the boundary of:

(1) the state;

(2) a county;

(3) a township;

(4) a city;

(5) a district of the House of Representatives of the Congress of the United States;

(6) a district of the senate of the general assembly; or

(7) a district of the house of representatives of the general assembly.

3-11-1.5-5 Boundaries; arrangements to follow other boundaries

Sec. 5. A county executive shall establish precincts so that each boundary of each precinct follows:

(1) a boundary described in section 4 of this chapter;

(2) a boundary of a town;

(3) a boundary of a town legislative body district; or

(4) a boundary of a census block established by the Bureau of the Census and depicted on census block boundary maps filed with the state election board.

3-11-3-17 Poll list; looseleaf sheet form or book form; dimensions and contents

Sec. 17. The county election board shall prepare the poll lists in looseleaf sheet form or book form. The sheets must have adequate space and lines on each side for taking the

signatures and addresses of the voters. The sheets may contain the names and addresses of the voters in the respective precincts in alphabetical order, with a space opposite each name for the signature and address of the voter when the voter votes and any other information required by law.

3-11-4-8 Overseas voters; applications; mailing of ballots

Sec. 8. (a) An overseas voter (as defined in 42 U.S.C. 1973ff-6(5) may apply for an absentee ballot from this state and vote by absentee ballot in an election in this state for which the voter is qualified and in which absentee ballots are used.

(b) A county election board shall make blank absentee ballot applications available for persons covered by this section after November 20 preceding the election to which the application

applies. The person may apply for an absentee ballot at any time after the applications are made available. If the county election board receives an absentee ballot application from a person described by this section, the circuit court clerk shall mail to the person, free of postage to the extent as provided by 39 U.S.C. 3406, all ballots for the election immediately upon receipt of the ballots under sections 13 and 15 of this chapter.

(c) Whenever an overseas voter files an application for a primary election absentee ballot under this section and indicates on the application that the voter does not expect to be in the county on general election day and on the date of any special election conducted during the twelve (12) months following the date of the application, the application is an adequate

application for a general election absentee ballot under this chapter and an absentee ballot for a special election conducted during the twelve (12) months following the date of the application. The circuit court clerk and county election board shall process this application and mail general election and special election absentee ballots to the voter in the same manner as other general election and special election absentee ballot applications and ballots are processed and mailed under this chapter.

3-11-4-9 Overseas voters; application requirements

Sec. 9. An absentee ballot application under section 8 of this chapter must:

(1) be made on a standard form approved under 42 U.S.C. 1973ff-(b) or on the form prescribed by the state

election board under section 5.1 of this chapter; and

(2) show that the overseas voter was a resident and otherwise qualified to vote in the precinct where the voter resided before leaving the United States.

3-11-8-2 Voting in precinct of residence

Sec. 2. A voter shall vote at the polls for the precinct where the voter resides except when authorized to vote in another precinct under IC 3-7-4 or IC 3-7-8-2 or at a special voting poll under section 6 of this chapter.

[Filed December 1, 1988]

SECOND AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, MONEY DAMAGES AND FOR DECLARATORY JUDGMENT
(Class Action)

Plaintiff Stephen M. Gallagher, for his claims for relief against defendants, alleges the following:

I. PRELIMINARY STATEMENT

1. The State of Indiana and its election officials are disenfranchising individuals who are registered to vote but who move from their county of residence within thirty days before an election. This practice contravenes Article II, Section 2, of the Indiana Constitution which provides that an individual may vote in a precinct if he or she was a resident of that precinct thirty days before the election. This practice also violates the state and

federal constitutional right of those individuals to the equal protection of the laws. The lawsuit seeks to end this unconstitutional practice, and to compensate members of the class for the deprivation of the right to vote.

* * *

COUNT THREE (Federal Equal Protection)

28. This count is brought under 42 U.S. Code § 1983.

29. IC 3-11-8-2, IC 3-7-8-2 and IC 3-7-3, insofar as those statutes permit registered voters who move their place of residence within the same county less than 30 days before the date of an election to vote in that election in their precinct of former residence for candidates for federal and statewide

offices and on statewide ballot propositions, but deny the same right to registered voters who move their place of residence to a location in a different county less than 30 days before the date of an election, treat similarly situated individuals differently without a compelling state interest in a matter involving a fundamental right and thereby violate the rights of Gallagher and members of the class to the equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

* * *

PRAYER FOR RELIEF

WHEREFORE, Gallagher and the class pray for the following relief:

* * *

B. A permanent injunction allowing members of the class represented by Gallagher to vote in any primary, municipal or general election held after 1988 in the precincts in which they were registered and of which they were residents on the day thirty days prior to the date of the election;

* * *

E. A declaratory judgment declaring and adjudging that IC 3-11-8-2, IC 3-7-8-2 and IC 3-7-3, insofar as those statutes permit registered voters who move their places of residence within the same county less than 30 days before the date of an election to vote in that election in

their precincts of former residence for candidates for federal and statewide offices and on statewide ballot propositions, but deny the same right to registered voters who move their places of residence to a location in a different county less than 30 days before the date of an election, treat similarly situated individuals differently without a compelling state interest in a matter involving a fundamental right and thereby violate the rights of Gallagher and members of the class to the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

* * *

[Filed February 7, 1989]

AMENDED INTERVENING COMPLAINT OF PLAINTIFF KEVIN MOUSER

Intervening plaintiff Kevin Mouser, on his own behalf and on behalf of subclass B as defined in the Second Amended Motion To Certify Class Action filed herein on November 7, 1988, for claims for relief against defendants, adopts the prayers for relief of the Second Amended Complaint filed December 1, 1988 by plaintiff Stephen M. Gallagher, and adopts the allegations in the Second Amended Complaint as the basis for his prayers for relief, with the amendments and revisions set forth herein.

I. PRELIMINARY STATEMENT

1. The State of Indiana and its election officials are disenfranchising

individuals who are registered to vote but who move from their precinct of residence within thirty days before an election. This practice contravenes Article II, Section 2, of the Indiana Constitution which provides that an individual may vote in a precinct if he or she was a resident of that precinct thirty days before the election. This practice also violates the federal constitutional right of those individuals to vote for federal offices other than electors for President and Vice-President of the United States, and the state and federal constitutional right of qualified voters to the equal protection of the laws. The lawsuit seeks to end this unconstitutional practice, and to compensate intervening plaintiff for the deprivation of his right to vote.

* * *

COUNT THREE

(Federal Equal Protection)

28. This count is brought under 42 U.S. Code § 1983.

29. IC 3-11-8-2, IC 3-7-8-2, IC 3-7-3 and IC 3-7-4, insofar as those statutes permit registered voters who move their place of residence within the same county less than 30 days before the date of an election, and not less than four days before the date of an election, and who appear in person at the office of the County Board of Voter Registration or County Clerk and execute the form of affidavit required under IC 3-7-8-2, to vote in that election in their precinct of former residence for candidates for federal, statewide, legislative district

and county offices and on statewide ballot propositions, but deny the same right to registered voters who move their place of residence within the county less than 30 days before the date of an election and who are unable to satisfy the requirements and restrictions in IC 3-7-8-2 as a condition to voting in the precinct of their former residence, treat similarly situated individuals differently without a compelling state interest in a matter involving a fundamental right and thereby violate the rights of Mouser and members of the class to the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

* * *

PRAYER FOR RELIEF

WHEREFORE, Mouser and the class pray for the following relief:

* * *

B. A permanent injunction allowing members of the class represented by Mouser to vote in any primary, municipal or general election held after 1988 in the precincts in which they were registered and of which they were residents on the day thirty days prior to the date of the election, upon compliance with the same procedures as required under IC 3-7-4, relating to voting for candidates for electors for President and Vice-President of the United States;

* * *

E. A declaratory judgment declaring and adjudging that IC 3-11-8-2, IC 3-7-8-2, IC 3-7-3 and IC 3-7-4, insofar as those statutes permit registered voters who move their place of residence within the same county less than 30 days before the date of an election, and not less than four days before the date of an election, and who appear in person at the office of the County Board of Voter Registration or County Clerk and execute the form of affidavit required under IC 3-7-8-2, to vote in that election in their precinct of former residence for candidates for federal, statewide, legislative district and county offices and on statewide ballot propositions, but deny the same right to registered voters who move their place of residence within the county less than 30 days before the date

of an election, and who are unable to satisfy the requirements and restrictions in IC 3-7-8-2 as a condition to voting in the precinct of their former residence, treat similarly situated individuals differently without a compelling state interest in a matter involving a fundamental right and thereby violate the rights of Mouser and members of the class to the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

* * *

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* * *

Supreme Court, U.S.
FILED
DEC 21 1992
OFFICE OF THE CLERK

No. 92-923

IN THE

Supreme Court of the United States

October Term, 1992

STEPHEN M. GALLAGHER and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,

Petitioners,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY; and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTION PRESENTED FOR REVIEW

Whether the sections of the Indiana Code, IC §§ 3-7-3-6, 3-7-8-2, and 3-11-8-2, that limit the franchise of an otherwise qualified voter who moves to a new precinct within thirty (30) days of an election to voting for only the President and Vice President, violate the Equal Protection Clause of the Fourteenth Amendment.

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No. 92-923

IN THE

Supreme Court of the United States

October Term, 1992

STEPHEN M. GALLAGHER and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,

Petitioners,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY; and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Indiana State Election Board, and its members in their official capacities, pursuant to Rule 15 of the Rules of this Court, respectfully oppose the petition for a writ of certiorari to review the decision of the Supreme Court of Indiana in the case of *Gallagher v. Indiana State Election Board*, Ind., 598 N.E.2d 510 (1992).

STATEMENT OF THE CASE

The basic facts of this case are set forth in the Indiana Supreme Court's decision, *Gallagher v. Indiana State Election*

Board, Ind., 598 N.E.2d 510 (1992). (Pet. App. A-1 *et* .). Respondents herein respectfully note that Petitioners' reliance on the numbers of persons affected by this class action (Petition for Writ of Certiorari pp. 13-14) was not a factual finding of any court below.

SUMMARY OF THE ARGUMENT

This case is inappropriate for review by this Court because:

A. Petitioners do not have a fundamental right to vote in a precinct in which they do not reside.

B. The distinctions drawn by the Indiana statutes are rationally related to legitimate state interests.

A. PETITIONERS DO NOT HAVE A FUNDAMENTAL RIGHT TO VOTE IN A PRECINCT IN WHICH THEY DO NOT RESIDE

Not every statute in a voting system is subject to strict scrutiny under the Equal Protection Clause. *Burdick v. Takushi*, 540 U.S. ____, 119 L.E.2d 245 (1992). Indiana's statutes dealing with voters who move *within* its thirty (30) day durational residency requirement are classic examples of reasonable restrictions to further important state regulatory interests.

Petitioners' entire argument is based upon the assertion that Gallagher and Mouser have a fundamental right to vote in the precinct in which they were registered, even though they moved out of the precinct and were no longer residents of the precinct at the time of the election. This Court has held that a person has no constitutionally-protected right to vote in a place where he is not a resident.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the United States Supreme Court acknowledged that:

> Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state

> officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determines who may vote for United States Representatives and Senators, Art . I, § 2; Seventeenth Amendment; *Ex parte Yarbrough*, 110 U.S. 651, 663, 4 S.Ct. 152, 28 L. Ed . 274 .

Id., 384 U.S. at 647 . The federal courts have thus acknowledged that a State's election qualifications affect federal elections, to the extent that voters are electing federal Congressional representatives.

The United States Supreme Court has *repeatedly* affirmed that a State has the power to require voters to be bona fide residents of relevant political subdivisions. *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) . The Indiana Court of Appeals and the Indiana Supreme Court properly found below that Indiana's Constitution requires an individual to be a resident of a precinct for a duration of at least thirty days continuously before an election in order to qualify as a bona fide resident of that precinct. Ind. Const. Art. 2 § 2. This requirement lies well within the powers granted to the States.

Congress, through the Supremacy Clause, U.S. Const. Art. 6, C1. 2, and 42 U.S.C. 1973aa-1, has mandated voter qualifications preempting state voter qualifications applicable only to the election of President and Vice-President. Indiana has recognized and given effect to the federal standards for Presidential and Vice-Presidential elections in IC § 3-7-4-1 *et seq.* In regard to voter qualifications in elections for all other federal, state and local offices, the states have authority to set voter qualifications. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

The Supreme Court held in *Dunn v. Blumstein, supra*, held that "In sum, *durational* residence laws must be measured by a strict equal protection test[.]" Id. at 405 U.S. 342 (emphasis

added). As framed by the Court itself, *Dunn* dealt only with the durational aspect of a residency requirement.

> The subject of this lawsuit is the durational residence requirement. Appellee does not challenge Tennessee's power to restrict the vote to bona fide Tennessee residents. Nor has Tennessee ever disputed that appellee was a bona fide resident of the State and county when he attempted to register. But Tennessee insists that, in addition to *being* a resident, a would-be voter must *have been* a resident for a year in the State and three months in the county. It is this additional *durational* residence requirement that appellee challenges.

Id. 405 U.S. at 334 (emphasis supplied by the Court).

In the present case, the length of the residency requirement is immaterial. The length of the residency requirement only becomes material when a person actually resides within a precinct at the time of the election. In that case, the length of the residency becomes material to determine whether the resident meets the durational requirement in order to be eligible to vote. However, the present case deals only with the treatment of different groups of people, all of whom are, in fact, *non-residents* of the precinct. Gallagher and Mouser were clearly not residents of the precincts in which they assert their right to vote at the time of the election. It is the very fact of residency, or lack thereof, not the length of residency, that is the disqualifying factor at issue in this case.

Gallagher and Mouser in the case at bar do not challenge the durational aspect of Indiana's residency requirement. They are not asserting their right to vote in the precincts in which they were residents at the time of the election. (Appellants' Brief and Appendix, filed with the Indiana Court of Appeals, pages 40-41). Instead, Gallagher and Mouser assert a fundamental right to return to, and vote in, a precinct in which they no longer reside. Because Gallagher and Mouser, and the classes they represent,

lacked residency in their old precincts, they have no fundamental right to vote in that precinct. *Burdick, supra; Holt, supra.*

It is only when a State grants the right to vote to some bona fide residents while denying the franchise to other bona fide residents that strict scrutiny is invoked and the State must show that the distinctions or exclusions are necessary to promote a compelling state interest. *Kramer v. Union Free School District*, 394 U.S. 621, 627 (1969). Petitioners wish to extend the holding of *Kramer* to people who are not bona fide residents of the precinct in which they wish to vote.

The United States Supreme Court specifically rejected the argument that citizens have a fundamental right to vote in a precinct where they are not a resident in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). Holt was an unincorporated community located near Tuscaloosa, Alabama. Holt was within Tuscaloosa's police jurisdiction, and therefore subject to the city's police, sanitary and business licensing regulations, as well as the jurisdiction of the city criminal court. However, residents of Holt were not entitled to vote in municipal elections. The appellants claimed that they were denied due process and equal protection by Tuscaloosa's extraterritorial exercise of police powers over Holt residents, without the corresponding extension of the right to vote on an equal basis with people residing within the corporate limits of Tuscaloosa. *Id.* at 61-63. This Court rejected the appellants' claim, stating:

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

Id. at 69-70. The Court concluded that since non-residents had no right to vote in the municipal election, the State was not

required to extend the vote to the appellants merely because they were subject to municipal regulation.

Petitioners' argument is similarly unfounded. They assert that Indiana denies inter-county movers (subclass A) equal protection by allowing a voter who moves to a different precinct in the same county to transfer his registration and vote in his former precinct for all electoral offices and propositions, while denying the same privilege to a voter who moves to a different county. They further assert that Indiana denies intra-county movers who fail or refuse to apply for transfer of their registration (subclass B) equal protection by allowing a voter who moves to a different precinct in the same county *and* completes the affidavit prescribed in IC § 3-7-8-2(d) to vote at his former precinct, while denying the same privilege to a voter who moves to a different precinct in the same county but fails or refuses to complete the affidavit prescribed in IC § 3-7-8-2(d). The bottom line is that the members of both subclasses have *no* right to vote in precincts where they are not residents, so the State is not required to extend the vote to them merely because it extends the vote to other non-residents.

Petitioners' factual situations are strikingly similar to one reviewed by a United States District Court in *Snead v. City of Albuquerque*, D.N.M., 663 F.Supp. 1084 (1987). In *Snead*, Bernalillo County landowners located outside the corporate boundaries of the City of Albuquerque sought the right to vote in a municipal bond election. New Mexico law prohibited individuals in the non-resident voting division from voting in the municipal bond election unless they had paid tax on property located within the city corporate boundaries during the year preceding the election, and had registered with the municipal clerk their intention to vote in the municipal election. The non-resident, non-taxpaying plaintiffs argued that if New Mexico extended the vote to some county residents, then it must extend the right to all county residents unless the classification served a compelling state interest. The non-resident, taxpaying plaintiffs argued that the requirement of registering their intention

to vote and the procedures for that registration were unduly burdensome and served no compelling state interest. *Id.* at 1085. The court, citing *Holt Civic Club*, rejected plaintiffs' claims and concluded that:

> Because the Plaintiffs in this case have no constitutionally protected right to vote in the city's elections, the mere fact that the New Mexico law extends the right to vote to some non-residents does not implicate strict scrutiny by this Court of the provisions. In other words, to implicate the higher standard of review on the basis of a "fundamental right" requires that the right be guaranteed by the Constitution.

Id. at 1087. Applying the same reasoning here, the mere fact that the Indiana legislature has extended the right to vote to some people who are not residents of the precinct in which they vote, or has required some of those non-residents to comply with a simple procedure before voting in their former precinct of residence, does not implicate a higher level of scrutiny by the court Non-residents such as Gallagher and Mouser have no fundamental right to vote in precincts where they do not reside.

B. THE DISTINCTIONS DRAWN BY THE INDIANA STATUTES ARE RATIONALLY RELATED TO LEGITIMATE STATE REGULATORY INTERESTS

Once an equal protection issue is "stripped of its voting rights attire," the Court should examine the statutes in question to determine whether those statutes bear a rational relationship to a legitimate state purpose. *Holt Civic Club*, 439 U.S. at 70. The statute offends equal protection "only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* at 71, quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1965). *See also Burdick v. Takushi, supra.*

Since the Petitioners have no fundamental right to vote in precincts where they are not residents, the question becomes whether Indiana's requirement of precinct residency bears a rational relationship to a legitimate state purpose, and whether IC § 3-7-8-2 bears a rational relationship to a legitimate state purpose. Indiana's precinct residency requirement bears a rational relationship to the State's legitimate interest in preserving the precinct as the basic political community in Indiana. In fact, this interest has been characterized by the United States Supreme Court as a compelling state interest.

In *Dunn, supra*, the United States Supreme Court noted:

> An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.

Id. at 343-44.

Indiana, through its Constitution and its statutes, has set up the precinct as the basic "political community" in this State. Ind. Const. Art. 2 § 2; IC § 3-11-1-1 *et seq*. Voters in each county are registered and vote according to the precinct in which they reside. IC §§ 3-7-1 et seq., IC § 3-11-1-1 et seq. Elections are conducted on the precinct level. IC § 3-11-8 *et seq*. Precinct boundaries are drawn to coincide with the boundaries of congressional and state legislative districts as well as city, township and county boundaries. IC § 3-11-1.5-4, (previously, IC § 3-11-1-2 (repealed)). Precincts are the basic, or fundamental, political communities in Indiana. The statutes, and the Indiana Constitution itself, requiring a person to be a resident of the precinct in which he votes are reasonably related to preserving the concept of the precinct as the basic, or fundamental, political community.

While it is true that congressional and legislative districts, as well as city, township, and county boundaries, each may

encompass several precincts, a person's congressional or legislative representative and his in municipal, township, and county elections, or any combination of the above, will depend on the precinct in which he resides. Because precinct lines do not cross congressional or legislative districts or city, township or county lines, when a person moves from one location to another *within* a precinct, his congressional and legislative districts and interest in local elections will not change. However, if a person moves outside his old precinct, his congressional and legislative districts as well as his interest in local elections may also change. In such a case, a person moving outside the precinct may lose any legitimate interest he may have had in voting for congressional or legislative representatives or for local offices in his old precinct.

A move outside a particular precinct may change any combination of legislative, executive or judicial offices or elections that a person has an interest in and therefore, should be entitled to vote for. A move from a precinct inside a city limits to a precinct outside the city limits may not change a person's congressional or legislative district but would remove any interest that person would have in voting for a municipal office. Likewise, a move to a precinct in another township or county would remove any interest a person would have in elections for township or county office. A move to another county may change the persons congressional or legislative districts. The determination of which of the above mentioned offices and elections a person has a legitimate interest in depends upon the precinct in which he resides. To allow persons who have moved out of the precincts, and thereby changed the make-up of their respective representatives, to vote in their old precinct where they no longer have any legitimate interest in the elections would unfairly dilute the votes of the residents who remain and retain a legitimate interest in the elections. Indiana's precinct residency requirement is rationally related to the state's legitimate interest in preserving the integrity of the precinct as the state's basic political community.

It may be possible for Indiana to devise an election method which would preserve the integrity of the precinct while still preserving a voters franchise in state-wide offices and issues. However, as long as a state has chosen a method which is constitutionally acceptable, the question of whether the state has chosen the soundest, most practical, or more preferable alternative for internal government is irrelevant. *Holt Civic Club*, 439 U.S. at 73-74. In *Holt*, then Justice Rehnquist specifically stated:

> From a political science standpoint, appellants' suggestion may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the state legislature and Alabama citizens are free to urge their proposals to that body. *See, e.g.. Hunter v. Pittsburgh*, 207 U.S. at 179, 28 S.Ct. at 46. Our inquiry is limited to the question whether 'any state of facts reasonably may be conceived to justify' Alabama's system of police jurisdiction, *Salyer Land Co. v. Tulane Lake Basin Water Storage Dist.*, 410 U.S. at 732, 93 S.Ct. at 1231[.]

Id. 439 U.S. at 73-74. Indiana's precinct residency requirement is constitutional as a pure residency requirement and is rationally related to a legitimate state interest in preserving the precinct as the basic political community in the State.

Indiana did, and still does, allow some people who have moved from the precinct in which they were registered within thirty (30) days of an election, to return to their old precinct and vote without limitation. IC § 3-7-8-2. If a person moves from one precinct to another, within the same county, within thirty (30) days of an election, and goes to the circuit court clerk or board of voter registration in their county, on or before 4:00 p.m. the

Friday before the election,[1] he can execute an affidavit and transfer his registration to their new precinct. The person is then allowed to return to his old precinct to vote without limitation. IC § 3-7-8-2(c).

By following *Holt*, the State could simply refuse to permit all people who had moved within the same county to vote at their old precincts (except for President and Vice President, when applicable). As noted by the trial court in this case, the statute permitting these people to vote, IC § 3-7-8-2, may be of doubtful constitutional validity under Article 2 § 2 of the Indiana Constitution. (R. at 295-296). *See, Board of Election Comm'rs v. Knight*, 187 Ind. 108, 117 N.E. 565 (1917); *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890). However, none of the parties to this case have any standing to challenge that aspect of the constitutionality of IC § 3-7-8-2 under the Indiana Constitution. *See, Callahan v. State*, 247 Ind. 350, 214 N.E.2d 648, 651 (1966) ("If the statute is unconstitutional, that fact alone avails a party nothing, unless as a result petitioner failed to get his constitutional right."); *Bagwell v. Chrysler Corporation*, Ind. App., 341 N.E.2d 799, 799 (1976) ("In order to challenge the constitutionality of a statute, a plaintiff must have suffered from its alleged constitutional infirmity.") (citing *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) and *Storer v. Brown*, 415 U.S. 724, 736-37 (1974).

The Indiana General Assembly could have reasonably assumed that a move from one precinct to another, within the same county, was less likely to result in a voter changing congressional or legislative districts and would be somewhat less likely to remove the voters' legitimate interest in local elections. Therefore, providing a mechanism to allow voters moving to another precinct in the same county to vote in their old precincts would be less of an infringement on the integrity of the

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[1]The Friday deadline was in effect at the time relevant to this case. The statute has now been amended to move the deadline forward to 4:00 p.m. on the Monday immediately before the Tuesday election. IC § 3-7-8-2(c) (1).

precinct as a political community and would be less likely to dilute the votes of the remaining residents of the precinct.

Furthermore, the administrative procedure enabling such individuals to vote is entirely reasonable. In order to comply with the statute, individuals who move within the same county may vote at their former precincts of residence by executing an affidavit up until the Friday before the election (presently, the Monday before the election). Asking an individual to complete the appropriate forms is hardly an impermissible burden on his right to vote, especially when considered in light of the fact that the individual is seeking to vote in a precinct where he is not a bona fide resident. Again, the fact that other states may have found a more practical or more preferable procedure is irrelevant.

On the other hand, the Indiana General Assembly could have reasonably assumed that a voter who moves to a precinct in another county is more likely to change congressional or legislative districts and certainly would lose all legitimate interest in city, township and county elections in his old county of residence. Therefore, permitting voters who move to a different county to vote in their old precinct, which is now in a totally different county, would impinge on the integrity of the precinct and would dilute the votes of the remaining residents who retain a legitimate interest in the local elections.

Indiana's durational precinct residency requirement is constitutional as a pure residency requirement and is rationally related to a legitimate state interest in preserving the precinct as the basic political community in Indiana. The statutes that permit some non-residents to vote while denying the franchise, with the exception of elections for President and Vice President, to other non-residents is also reasonably related to the State's legitimate interest and does not violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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